FR-4

SURFACE TRANSPORTATION BOARD

49 CFR Parts 1011, 1108, 1115, and 1244

[Docket No. EP 765]

Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: In response to a joint petition for rulemaking filed by five Class I rail carriers, the Surface Transportation Board (STB or Board) proposes to modify its regulations to establish a voluntary arbitration program for small rate disputes.

DATES: Comments on the proposed rule are due by January 14, 2022. Reply comments are due by March 15, 2022.

ADDRESSES: Comments and replies may be filed with the Board via e-filing on the Board's website at www.stb.gov and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Pursuant to 49 U.S.C. 11708, the Board's regulations at 49 CFR part 1108 establish a voluntary arbitration program "under which participating parties, including rail carriers and shippers, have agreed voluntarily in advance or on a case-by-case basis to resolve disputes about arbitration-program-eligible matters brought before the Board using the Board's arbitration procedures." 49 CFR 1108.1(c).

On July 31, 2020, five Class I rail carriers—Canadian National Railway Company (CN),[1] CSX Transportation, Inc. (CSXT), the Kansas City Southern Railway Company, Norfolk Southern Corp. (NSR), and Union Pacific Railroad Company (UP) (collectively, Petitioners)—filed a petition for rulemaking (the Petition) to add a small rate case arbitration program at 49 CFR part 1108a, which would function alongside the existing arbitration program at 49 CFR part 1108.[2] Petitioners pledge to consent to arbitrate disputes under their proposed program for a period of five years, provided the Board adopts the program according to the terms set forth in the Petition. These terms include the right of the carriers to withdraw from the program under certain circumstances, such as if the Board adopts a material change to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper or railroad has opted into the program. (Pet. 17.)

Replies to the Petition were filed on August 20, 2020, by the National Grain and Feed Association (NGFA); Olin Corporation (Olin); the American Fuel & Petrochemical Manufacturers (AFPM); the U.S. Department of Agriculture (USDA)[3]; and (filing jointly) the American Chemistry Council, Corn Refiners Association, Institute of Scrap Recycling Industries, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute (collectively, Joint Shippers).

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[1] The petition lists one of the petitioners only as "CN." A supplemental filing identifies this party as the "U.S. operating subsidiaries of CN." Although not identified in either filing, the Board understands "CN" to mean Canadian National Railway Company.

[2] Although the Petition refers to Norfolk Southern Corp., a noncarrier, a subsequent supplement instead refers to that entity's operating affiliate, Norfolk Southern Railway Company. (Pet'rs Suppl. 2.) When referring to NSR in this decision, the Board is referring only to Norfolk Southern Railway Company.

[3] USDA structures its comment as individual letters to the three then-current Board Members. Aside from the headings, the content of each letter is identical.

Supplemental pleadings were filed on September 10, 2020, and the Board instituted a rulemaking proceeding to consider the proposal on November 25, 2020.

After considering the Petition and the comments received, the Board will grant the Petition, as qualified below, and propose new regulations at 49 CFR part 1108, subpart B,[4] establishing a voluntary arbitration program for small rate cases.

BACKGROUND

The Board established arbitration procedures at 49 CFR part 1108 in 1997. See Arb. of Certain Disputes Subject to the Statutory Juris. of the STB, 62 FR 46217 (Sept. 2, 1997), 2 S.T.B. 564 (1997). Under those procedures, as originally conceived, parties could agree voluntarily on a case-by-case basis to arbitrate any dispute involving the payment of money or involving rates or practices related to rail transportation or services subject to the Board's statutory jurisdiction. Id. at 565. The Board established those procedures pursuant to its authority at 49 U.S.C. 721 (now 49 U.S.C. 1321), which generally authorizes the Board to prescribe regulations in carrying out its statutory responsibilities. Id. at 582.

In 2013, the Board modified its arbitration procedures in Assessment of Mediation & Arbitration Procedures, 78 FR 29071 (May 17, 2013), EP 699 (STB served May 13, 2013) (revising and consolidating the Board's arbitration procedures). Among other things, the Board established a program under which a party could voluntarily agree in advance to arbitrate particular types of disputes with clearly defined limits of liability. Id. at 4. The revised regulations did not include rate disputes as an arbitration-program-eligible matter.[5] Id. at 7-9.

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[4] Petitioners proposed that the regulations establishing the new arbitration program at a new part (49 CFR part 1108a) but creating a new subpart within 49 CFR part 1108 is more consistent with Code of Federal Regulations formatting.

[5] The revised regulations permitted parties to agree on a case-by-case basis to arbitrate additional matters, provided that the matters were within the Board's statutory

In section 13 of the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), Congress required the Board to promulgate regulations establishing a voluntary and binding arbitration process to resolve rail rate and practice complaints under its jurisdiction. See Pub. L. 114-110, section 13, 129 Stat. 2228, 2235-38. Section 13, which is codified at 49 U.S.C. 11708, set forth certain requirements and procedures for the Board's arbitration process, such as listing categories of covered disputes and imposing timelines. Id.

In response to section 13 of the STB Reauthorization Act, the Board further adjusted its procedures at 49 CFR part 1108 to add rate disputes to the matters eligible for arbitration under its arbitration program and made other changes to conform to the requirements set forth in the statute. See Revisions to Arb. Procs. (Revisions Final Rule), 81 FR 69410 (Oct. 6, 2016), EP 730, slip op. at 1-2 (STB served Sept. 30, 2016) corrected (STB served Oct. 11, 2016). To date, three Class I carriers have opted into the Board's arbitration program for certain types of disputes (though not rate disputes),[6] but the program has never been used.

In January 2018, the Board established the Rate Reform Task Force (RRTF) with the objective of, among other things, determining how best to provide a rate review process for small cases.[7] After holding informal meetings throughout 2018, the RRTF

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jurisdiction to resolve and that the dispute did not require the Board to grant, deny, stay or revoke a license or other regulatory approval or exemption, and did not involve labor protective conditions. See Assessment of Mediation & Arb. Procs., EP 699, slip op. at 8-9.

[6] See UP Notice (June 21, 2013), CSXT Notice (June 28, 2019), and CN Notice (July 1, 2019), Assessment of Mediation & Arb. Procs., EP 699.

[7] The RRTF Report stated that, for small disputes, the litigation costs required to bring a case under the Board's existing rate reasonableness methodologies can quickly exceed the value of the case. RRTF Report 5-8, 9, 14; see also Expanding Access to Rate Relief, 81 FR 61647 (Sept. 7, 2016), EP 665 (Sub-No. 2), slip op. at 10 (STB served Aug. 31, 2016).

issued a report on April 25, 2019 (RRTF Report).[8] Two key recommendations of the report were legislation to permit mandatory arbitration of small rate disputes and that the Board establish a new rate reasonableness decision-making process under which a shipper and railroad would each submit a "final offer" of what it believes a reasonable rate to be, subject to short, non-flexible deadlines, with the Board selecting one party's offer without revision. RRTF Report 14-20.

In September 2019, the Board proposed a new procedure for challenging the reasonableness of railroad rates in smaller cases based on a final offer selection procedure, which it called Final Offer Rate Review (FORR). See Final Offer Rate Rev., 84 FR 48872 (Sept. 17, 2019), EP 755 (STB served Sept. 12, 2019). All Class I carriers who commented in that proceeding opposed FORR on both legal and policy grounds. In its comments, CN argued that the Board should abandon consideration of FORR and suggested that the Board instead consider including within its existing arbitration program a targeted avenue for smaller rate disputes. See CN Comments 25-27, Nov. 12, 2019, Final Offer Rate Rev., EP 755; see also CN Reply Comments 2-3, Jan. 10, 2020, Final Offer Rate Rev., EP 755. CN stated that such a program should include the following features: mandatory mediation, confidentiality, non-precedential decisions, more modest limits on relief than those authorized under 49 U.S.C. 11708, and voluntariness. See CN Comments 25-27, Nov. 12, 2019, Final Offer Rate Rev., EP 755.[9]

In May 2020, the Board issued a decision that allowed for post-comment period ex parte discussions with stakeholders regarding FORR. See Final Offer Rate Rev., EP 755 (STB served May 15, 2020). Noting that its arbitration program has gone unused,

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[8] The RRTF Report can be accessed on the Board's website at https://prod.stb.gov/wp-content/uploads/Rate-Reform-Task-Force-Report-April-2019.pdf.

[9] The Association of American Railroads (AAR) also called for the Board to investigate how to encourage parties to make greater use of its voluntary arbitration program in a separate proceeding. See AAR Comments 3, Feb. 13, 2020, Hr'g on Revenue Adequacy, 84 FR 48982 (Sept. 17, 2019), EP 761.

the Board expressed interest in exploring the issues raised in CN's comments, as well as whether and how its arbitration program at 49 CFR part 1108 could be modified to provide a practical and useful dispute resolution mechanism, particularly for stakeholders with smaller rate disputes. Id. at 2.

During ex parte discussions with the Board Members, certain Petitioners elaborated on the potential small rate case arbitration framework outlined in CN's comments. Some carriers argued that the Board should adopt changes to its existing arbitration process, such as allowing for a more flexible arbitrator selection process and for arbitration to have greater confidentiality protections. See CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 1-2, July 8, 2020 (filing ID 300856) Final Offer Rate Rev., EP 755; CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 1-2, July 27, 2020 (filing ID 300928) Final Offer Rate Rev., EP 755. Those carriers also suggested that the Board consider, among other things, creating an incentive for carriers to arbitrate by exempting them from FORR or other types of rate challenges if they agree to participate in arbitration. See CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 2, July 10, 2020 (filing ID 300866) Final Offer Rate Rev., EP 755. They indicated their intent to submit a proposal to the Board that could attract support from multiple stakeholders. See CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 1-2, July 21, 2020 (filing ID 300901) Final Offer Rate Rev., EP 755.

In their ex parte discussions with Board Members, shipper interests generally did not oppose an arbitration process provided it is fair, though most advocated in favor of the Board adopting FORR. See, e.g., Olin Ex Parte Meeting Mem. 2, July 15, 2020 (filing ID 300883) Final Offer Rate Rev., EP 755; American Chemistry Council Ex Parte Meeting Mem. 3, July 17, 2020 (filing ID 300897) Final Offer Rate Rev., EP 755; Solvay America Inc. Ex Parte Meeting Mem. 1, July 22, 2020 (filing ID 300916) Final Offer Rate Rev., EP 755.

On July 31, 2020, Petitioners filed the Petition, asking the Board to establish a new arbitration program for small rate cases. Petitioners argue that establishing a working arbitration program for small rate disputes may offer the best long-term way to resolve the recurring concern that even the Board's simplified rate review methodologies are insufficient in terms of flexibility, cost, and speed. (Pet. 1.) Petitioners propose certain changes from the Board's existing arbitration process at 49 CFR part 1108, which they assert would make their proposed arbitration program streamlined and more flexible than the existing process and thus incentivize both railroad and shipper participation. (Id. at 3.) Among these changes are delegating market dominance determinations to the arbitration panel, adding confidentiality protections, and allowing the use of arbitrators who are not on the Board-maintained roster. (Id. at 21.) Petitioners also claim that their proposed small rate case arbitration program is both low-cost and consistent with statutory and economic principles, which they claim distinguishes it from the FORR procedures proposed in Docket No. EP 755. (Id. at 4.)

On August 20, 2020, NGFA, Olin, AFPM, USDA, and Joint Shippers filed replies. NGFA and USDA state that they support the Board commencing a rulemaking proceeding on the Petition, subject to certain modifications and provided that the Board not delay implementation of FORR. (NGFA Reply 1; USDA Reply 1.)[10] Joint Shippers, Olin, and AFPM urge the Board to deny the Petition and focus on completing the proceeding in FORR. (Joint Shippers Reply 2-3; Olin Reply 1-2; AFPM Reply 5.) Though some reply commenters state that the Petitioners' proposal has elements worthy of consideration, (Joint Shippers Reply 3), and that a properly structured, efficient, and affordable arbitration approach could well be a preferred alternative to FORR in many

[10] NGFA explains that it had a series of initial discussions with representatives of the Petitioners prior to Petitioners' submission of the Petition and that, while those discussions were "constructive and conducted in good faith," NGFA and the Petitioners were unable to reach a consensus on the proposal. (NGFA Reply 1-2.)

circumstances, (USDA Reply 2), several reply commenters argue that Petitioners are attempting to either delay the Board's adoption of FORR or to avoid being subject to FORR if it is adopted. (Joint Shippers Reply 4-5; AFPM Reply 1, 4; Olin Reply 8-9; USDA 1; see also NGFA Reply 5 (objecting to allowing carriers to be exempt from the FORR process if they participate in the arbitration program).) Reply commenters also object to specific aspects of the proposal, such as the fact that shippers would be prohibited from challenging the rates under revenue adequacy principles, (see Joint Shippers Reply 4-5; Olin Reply 7-8), and that arbitration decisions would be confidential, (see USDA Reply 3; NGFA Reply 7-8).

NGFA stated that it would not object to allowing Petitioners an opportunity to reply and inform the Board whether the carriers would be amenable to NGFA's proposed modifications, "as well as whether consideration and adoption of those changes would result in their electing not to participate in the [proposed program] if modified in certain respects." (NGFA Reply 3.) The Board issued a decision on August 26, 2020, permitting Petitioners to submit a supplemental pleading regarding the proposed modifications to the arbitration program suggested by NGFA and other parties. Other interested parties were also permitted to respond.

On September 10, 2020, Petitioners submitted a supplemental filing, as did AFPM, the Joint Shippers, and the U.S. Wheat Associates Transportation Working Group (U.S. Wheat).[11] In their supplemental filing, Petitioners state that they are agreeable to several modifications to the proposed program, but not to the core features of

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[11] U.S. Wheat did not submit a reply to the Petition but filed a response to the Board's August 26, 2020 decision. In its supplement, U.S. Wheat argues that there are several differences between Petitioners' proposed arbitration program and the Board's FORR proposal that make FORR more favorable to wheat shippers, such as the fact that FORR would be a public process, that the proposed arbitration program would take longer because of a party's ability to appeal to the Board, and that the proposed arbitration program would exclude the ability to raise claims based on the revenue adequacy constraint. (U.S. Wheat Suppl. 6-7.)

confidentiality, exemption from FORR, and a prohibition on revenue adequacy considerations. The shipper groups largely renew their previously stated objections.

On January 25, 2021, Canadian Pacific (CP),[12] a Class I rail carrier, filed a letter stating that it supports the effort to find a "workable, reasonable, accessible arbitration program for small rate cases, and would participate in such a pilot program." (CP Letter 1.)

The Proposed Rule

The Board has pursued different ways to improve its processes for rate relief, particularly for smaller cases. See Final Offer Rate Rev., EP 755, slip op. at 3 (STB served Sept. 12, 2019); Mkt. Dominance Streamlined Approach, 84 FR 48882 (Sept. 17, 2019), EP 756, slip op. at 3 n.5 (citing Expanding Access to Rate Relief, EP 665 (Sub-No. 2), slip op. at 10 (STB served Aug. 31, 2016). Based on one of the RRTF's recommendations, the Board proposed the FORR process. Here, Petitioners urge the Board to adopt their proposed voluntary arbitration program and exempt those carriers that choose to participate in the program from having their rates challenged under the FORR process, if that process is adopted.

Petitioners argue that their proposed arbitration program is the best path forward to provide meaningful access to rate review for small rate cases and that, with Petitioners' pledge to commit to the program for five years, the program would provide an available avenue to resolve small rate disputes. (Pet. 28.) As noted, they claim that their proposed arbitration program is both low-cost and consistent with statutory and economic principles, which they argue makes the program different from FORR. (Pet. 4.)

[12] According to CP, "Canadian Pacific" is a trade name under which Canadian Pacific Railway Company and its United States subsidiaries—Soo Line Railroad Company; Dakota, Minnesota & Eastern Railroad Corporation; Delaware and Hudson Railway Company, Inc.; and Central Maine & Quebec Railway US Inc.—operate. (CP Letter 1.)

As noted above, several shipper interests generally oppose Petitioners' proposed arbitration program. Among their objections is the idea that carriers participating in arbitration would be exempt from FORR. (Joint Shippers Reply 4-5; AFPM Reply 1, 4; Olin Reply 8-9; AFPM Suppl. 1, 2; U.S. Wheat Suppl. 7.) The Joint Shippers argue that this condition would allow "a railroad to exempt itself from the FORR process simply by opting into the arbitration process and there would be nothing that a shipper who prefers FORR over arbitration could do about it." (Joint Shippers Reply 4.) The Joint Shippers also argue that, if carriers are exempt from FORR, they will have no incentive to seek improvements to the arbitration program to ensure it is effective. (Joint Shippers Suppl. 5.) Olin argues that the "adequate justification" required for the grant of a rulemaking petition under the Board's regulations has not been presented by Petitioners here. (Olin Reply 8.)

AFPM and U.S. Wheat argue that FORR presents far greater potential for reducing regulatory burdens and increasing the accessibility of a remedy for unreasonable rail rates than the arbitration process outlined in the Petition. (AFPM Reply 1; U.S. Wheat Suppl. 6.)[13] AFPM and U.S. Wheat also take issue with the fact that only five of the seven Class I railroads have indicated they would participate. AFPM argues that this "would create a patchwork of inconsistent regulations." (AFPM Reply 4.) U.S. Wheat states that it has a serious concern that the process would be unfair if the other two Class I carriers, BNSF Railway Company (BNSF) and CP do not participate, particularly since a large amount of U.S. Wheat's stakeholders' rail traffic moves on BNSF. (U.S. Wheat

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[13] APFM also objects to Petitioners submitting their Petition eight months after the comment period closed in Final Offer Rate Review. (APFM Reply 2-4.) However, the Board itself—prompted by comments filed in that proceeding by CN—stated that it was interested in exploring the possibility of modifying its arbitration procedures to increase their usefulness for stakeholders with smaller rate disputes and waived its prohibition on ex parte communications for that specific purpose. Final Offer Rate Rev., EP 755, slip op. at 2-3 (STB served May 15, 2020). Moreover, the Board's regulations do not limit when petitions for rulemaking may be filed. 49 CFR 1110.2(b), (c).

Suppl. 6.) These filings pre-dated CP's letter, described above, concerning its potential participation in an arbitration program. (CP Letter 1.)

NGFA believes that FORR and arbitration can be constructed in a way to coexist and complement one another. (NGFA Reply 2.) Although NGFA generally objects to exempting railroads that participate in arbitration from the FORR process, it proposes several alternatives to Petitioners' proposal. These alternatives, which contemplate some limited form of a FORR exemption, include the Board: (1) setting the duration for the proposed arbitration program at two to three years, after which time, the Board would be required to conduct an assessment to determine whether the program is working as intended and whether the FORR exemption should be removed; (2) requiring a shipper to pursue its initial rate case against a carrier through arbitration but allow the shipper to utilize either FORR or arbitration for any subsequent rate cases; or (3) allowing a railroad to voluntarily decline to be subject to the FORR exemption. (NGFA Reply 5-6.)

USDA states that while an arbitration process could be useful, an arbitration program should complement FORR (rather than be a substitute), and it urges the Board to move forward expeditiously to finalize FORR and not allow the Petition to interfere with or delay that effort. (USDA Reply 1-2; see also Olin Reply 2 (arguing that the Board should adopt FORR now and consider implementing a new arbitration process later).) USDA argues that carriers will have no incentive to arbitrate without an effective rate review mechanism as a backstop. (USDA Reply 1; see also Olin Reply 9.)

In their supplemental filing, Petitioners argue that the voluntary nature of arbitration, as well as the efficiency, speed, low cost, and flexibility of the proposed program would make it a superior option to FORR, which they contend has various legal and procedural infirmities. (Pet'rs Suppl. 13-14.) Petitioners contend that it would not be reasonable for them to consent to participate in the proposed arbitration program without being exempt from FORR, and such an exemption appears to be central to their

proposal. (Id. at 14.) Petitioners argue that their proposed program solves the very problem that the Board seeks to remedy with FORR. (Id.)

After careful consideration, the Board has determined to defer final action in the FORR docket to provide for parallel consideration of the voluntary, small rate case arbitration program proposed in this docket. This approach will enable the Board and stakeholders to consider a new proposal for an arbitration process simultaneously along with the proposed rulemaking in Final Offer Rate Review, Docket No. EP 755. In order to consider the pros and cons of enacting an arbitration process that would effectively exempt participating carriers from FORR challenges, as Petitioners request, or enacting FORR and making it available regardless of whether or not the Board adopts a new arbitration program, as many shipper interests have urged, the Board has concluded that both the voluntary, small rate case arbitration program and FORR should be considered concurrently by the Board and stakeholders before final action is taken on either.

The arbitration proposal in the notice of proposed rulemaking (NPRM) here is modeled on some (but not all) aspects of Petitioners' proposal.[14] Congress required rate disputes be included as eligible for arbitration. 49 U.S.C. 10708(b); see also S. Rep. No. 114-52 at 7, 13. The Board has frequently stated that it favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, "whenever possible." See 49 CFR 1108.2(a); Bos. & Me. Corp.—Appl. for Adverse Discontinuance of Operating Auth.—Milford-Bennington R.R., AB 1256, slip op. at 10 (STB served Oct. 12, 2018). The Board finds it would be premature to discard the possibility of a voluntary, small rate case arbitration program without further

[14] Due to the potential interrelationship between the small rate case arbitration program proposed by Petitioners and FORR, the Board will post notice of this decision in Docket No. EP 755.

exploring whether such an approach might be workable and the interplay of that approach with FORR.

A voluntary arbitration program focused on the resolution of small rate disputes, as proposed below, could further the rail transportation policy of 49 U.S.C. 10101. Specifically, it could facilitate the expeditious handling and resolution of proceedings (49 U.S.C. 10101(15)); support fair and expeditious regulatory decisions when regulation is required (49 U.S.C. 10101(2)); and help to maintain reasonable rates where there is an absence of effective competition (49 U.S.C. 10101(6)). The proposed voluntary arbitration program could also complement congressional directives in the STB Reauthorization Act, which requires that the Board "maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case," and that it "maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates." 49 U.S.C. 10701(d)(3), 10704(d). A voluntary arbitration program for small rate disputes could provide an additional option beyond the Board's existing formal rate reasonableness processes designed for relatively small disputes (i.e., Three-Benchmark and Simplified Stand-Alone Cost (Simplified-SAC) tests).

In order to allow stakeholders to fully compare the arbitration and FORR proposals, as emphasized above, the Board is simultaneously with this NPRM issuing a supplemental notice of proposed rulemaking (FORR SNPRM), published elsewhere in this issue of the **Federal Register**, reflecting modifications in the FORR rule proposed in Final Offer Rate Review, EP 755 (STB served Sept. 12, 2019). In addition to noticing those modifications, FORR SNPRM addresses comments received by the Board in response to the original notice of proposed rulemaking and the ex parte meetings conducted in the FORR docket. Whether to adopt any voluntary rate review arbitration

program, how such a program might interact with the process proposed in the FORR docket, and whether to adopt the proposed FORR process will be guided by the parallel consideration of both proposals.

Because the arbitration of disputes before the Board is voluntary, fundamental to the Board's determination whether to enact the arbitration proposal in this docket will be a commitment of all Class I carriers to agree to arbitrate disputes submitted to the program for a term of no less than five years. This initial commitment would promote the goal that shippers have similar access to rate review procedures. The importance of this initial commitment is amplified by the carriers' opposition to FORR and the likelihood that they would seek to challenge adoption of that process. (See Pet'rs Suppl. 13 (stating that the FORR process would be "subject to immediate legal challenges").) If all Class I carriers consent to participate in this proposed arbitration program for five years, and the Board determines to adopt the program after stakeholder consideration and input, shippers served by Class I carriers would be afforded a new avenue for potential rate relief, and with the certainty of carrier engagement.[15]

Further, given the voluntary nature of the arbitration of rate disputes, any such program is not likely to succeed unless stakeholders find the program's important elements acceptable. Accordingly, the voluntary arbitration program being proposed here focuses on incentivizing railroad and shipper participation[16] and ensuring that the

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[15] As stated in the FORR proceeding, rate cases filed to date indicate that complainants' rate concerns relate primarily to Class I carriers. Final Offer Rate Rev., EP 755, slip op. at 16-17. While the Board views participation by the Class I carriers as particularly important, nothing in this proposal would prohibit Class II and Class III carriers from voluntarily participating in the arbitration process on a term basis. As explained below, Class II and Class III carriers would also be permitted to participate on a case-by-case basis.

[16] Although the Board uses the term "shipper" throughout the decision for convenience, the Board has made clear that parties other than shippers have standing to bring rate challenges. See Publ'n Requirements for Agri. Prods., EP 526 et al., slip op. at 7-8 (STB served Dec. 29, 2016). For this reason, the Board uses the term "shipper/complainant" in the proposed regulations. See below.

program is fair and balanced. To achieve this, the Board's proposal modifies aspects of the program proposed by Petitioners. Although Petitioners have "reserve[d] their right" not to participate in arbitration if any modifications are made to their proposal, (Pet. 21), certain elements of Petitioners' proposal would have made the program unbalanced or simply are not feasible. However, the program proposed here is based on law and sound policy and still includes features that carriers should find attractive. By the same token, the Board also views its proposed voluntary arbitration program as including features that shippers should find beneficial, particularly those shippers that consider the Board's current processes too expensive and time consuming given the size of their disputes.

The Board will consider all comments received on the proposal set forth in this decision and the information gathered during any requested ex parte meetings in this docket,[17] along with the comments filed and ex parte discussions that have taken place in the FORR docket, before deciding its next actions with respect to both proceedings.

The Board discusses below the significant features of the voluntary, small rate case arbitration program that it is proposing here. The proposed rule is set out below.

I. Authority for a Separate Small Rate Case Arbitration Program.

The Petition calls for the Board to establish a new arbitration program under a new set of regulations at 49 CFR part 1108a, which would function alongside the Board's existing regulations at 49 CFR part 1108. Petitioners argue that the Board may establish such a program pursuant to its general authority at 49 U.S.C. 1321, and that the program would therefore be "separate and distinct" from the requirements of 49 U.S.C. 11708. (Pet. 19, 22.)[18] Specifically, Petitioners contend that the Board has satisfied

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[17] Pursuant to 49 CFR 1102.2(g), ex parte communications with Board Members in informal rulemaking proceedings are permitted after the issuance of a notice of proposed rulemaking and until 20 days before the deadline for reply comments.

[18] (See also Pet., App. A at 2-3 (relying on section 1321(a), 5 U.S.C. 571, 49 U.S.C. 10101(15), and section 10701(d)(3) as the authorities for the proposed program).)

49 U.S.C. 11708 through its most recent amendments to 49 CFR part 1108, and suggest that because the Board has one set of compliant procedures, it is now free to adopt procedures that "differ from the requirements" of 49 U.S.C. 11708. (Id. at 3, 19.) They argue that the specific elements of their proposed program will necessarily be legal so long as the parties voluntarily consent to the arbitration, and so long as the program "is limited to deciding issues within the Board's jurisdiction to decide." (Id. at 19-20.)

Section 11708 requires that the Board promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints. 49 U.S.C. 11708(b)(1). Section 11708 specifically covers the subject of Board-sponsored rail rate arbitration, whereas 49 U.S.C. 1321 covers the Board's general rulemaking authority.[19] Thus, the Board finds that the most reasonable interpretation is that the authority for Board procedures for arbitrating rate cases derives from section 11708.[20]

However, there is no language in section 11708 prohibiting the Board from establishing more than one arbitration program that complies with the requirements of the statute. As relevant here, the statute merely requires that the Board establish a "voluntary and binding arbitration process to resolve rail rate and practice complaints subject to the jurisdiction of the Board." 49 U.S.C. 11708(a). Accordingly, a dual-track arbitration program—i.e., a program under 49 CFR part 1108, subpart A, and another under proposed 49 CFR part 1108, subpart B—is permissible. Cf. Simplified Standards for Rail Rate Cases (Simplified Standards), 72 FR 51375 (Sept. 7, 2007), EP 646 (Sub-No. 1),

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[19] See Norwest Bank Minn. Nat'l Ass'n v. FDIC, 312 F.3d 447, 451 (D.C. Cir. 2002) ("When both specific and general provisions cover the same subject, the specific provision will control, especially if applying the general provision would render the specific provision superfluous . . . .") (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987)).

[20] This is not to say that parties may not voluntarily consent to private arbitration of rail rate and related disputes on terms differing from the requirements in 49 U.S.C. 11708. Indeed, by its terms, section 11708 does not prevent "parties from independently seeking or utilizing private arbitration services to resolve any disputes the parties may have." 49 U.S.C. 11708(b)(3).

slip op. at 52 (STB served Sept. 5, 2007) (stating that a three-tiered system for rate review fulfilled the directive in 49 U.S.C. 10701(d)(3) to establish "a simplified and expedited method" for determining rate reasonableness), aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir.), vacated in part on reh'g, 584 F.3d 1076 (D.C. Cir. 2009).

The Board concludes that the arbitration program proposed in this decision is consistent with section 11708. It is therefore not necessary to consider proposing rate case arbitration rules under other potential sources of authority.

II. Program Participation, Withdrawal Rights, and FORR Exemption.

Petitioners have proposed an arbitration program, like that at 49 CFR part 1108, in which by agreeing to participate on a programmatic basis (i.e., opting in) as opposed to a case-by-case basis, a carrier will be required to arbitrate eligible cases for so long as it is participating within the program. The Board has explained above the importance of all Class I railroads agreeing to participate in the arbitration program for a term of five years. Accordingly, the Board will not allow for at-will participation as Petitioners have proposed, and will only permit term participation, with the initial term due to expire five years from the effective date of the arbitration program.[21]

Petitioners also propose triggers that would allow a participating carrier to withdraw from the proposed arbitration program. Because the participation of all Class I railroads is an important aspect of the arbitration program, the Board proposes more narrow withdrawal rights that would allow withdrawal from the program only if there is a material change in law. However, the Board emphasizes the importance of a readily

[21] Participation on an "at will" basis means that the carrier reserves the right to withdraw from the proposed program at any time for any reason, while participation on a "term" basis means that the carrier agrees to participate in the program for a specific length of time and can only opt out under certain conditions. (See Pet. 16-17, App. A at 3.) Under Petitioners' proposal, upon expiration of any such "term," a participating carrier remains within the program on an at-will basis. (Id., App. A at 3, 4.)

accessible small rate case review process as a backstop in the event a carrier is no longer participating in the arbitration program.[22] Indeed, in determining final action in this docket, the Board will continue to prioritize the aforementioned goal of enhancing shippers' access to rate relief. Accordingly, the Board seeks comment specifically on whether its consideration of carriers' withdrawal rights, as set forth in the following subsections, should take into account the availability of other readily accessible rate review processes, including whether any such mechanism is adopted concurrently with the adoption of any voluntary, small rate case arbitration program.

To account for the possibility that the Board might adopt FORR either concurrently with the adoption of a voluntary arbitration program or during the pendency of such a program, the Board will propose at this time—without deciding the ultimate outcome of that proceeding—that participation in arbitration exempts participating carriers from FORR, as explained further below.

A. Program Participation.

Petitioners propose that parties would "opt into" the proposed program; however, unlike under the Board's existing arbitration program, carriers participating in the proposed program would not be allowed to limit their participation to only certain types of disputes or disputes meeting additional criteria (such as a lower monetary relief cap).[23] (Pet., App. A at 3-4.) Also, unlike 49 CFR 1108.3(a)(2), Petitioners propose that railroads would not be able to participate on a case-by-case basis but instead would be required to opt into the program in advance, either on an at-will or term basis. (Id. at App. A at 3.) Shippers would be allowed to opt into the proposed program on a case-by-

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[22] The Board notes that Petitioners themselves appear to have contemplated such a backstop by effectively conditioning carrier participation in the arbitration program on an exemption from FORR.

[23] Under the existing arbitration program, a party may limit its participation to certain types of disputes or certain monetary relief caps. See 49 CFR 1108.3(a)(1).

case basis. (Id.) As in 49 CFR 1108.4(c), the Petition provides that the Board would maintain on its website a list of railroads that have opted into the program. (Id.)

As explained above, the Board will propose allowing carriers to opt into the proposed program only on a term basis of five years. To allow a shipper to potentially challenge rates for multi-carrier moves between a Class I and Class II or III carrier, the Board will also propose that Class II or III carriers can choose to voluntarily participate on a case-by-case basis. See proposed § 1108.23(a)(4). The Board will propose that shippers may opt in on a case-by-case basis, as Petitioners have suggested.

The Board's proposal that both carriers and shippers opt-in voluntarily complies with section 11708, which requires that the Board's rate case arbitration procedures be "voluntary" but does not specify a mechanism for participation. For cases in which a movement involves the participation of multiple railroads, arbitration could only be used if all carriers involved in the movement have opted in (which the Class I carriers will have already done) or consented to participate for a particular dispute (in the case of Class II or III carriers[24]).

To distinguish between parties that opt into the existing arbitration process created in Docket No. EP 699 (as modified in Docket No. EP 730), the Board will propose requiring that railroads opting into the proposed program file their opt-in notices under Docket No. EP 765, which will also be posted on the arbitration page of the Board's website. See proposed § 1108.23(a).

B. Withdrawal Rights.

Petitioners propose that a carrier participating in the proposed arbitration program should be permitted to withdraw from the program if: (1) the Board adopts the FORR process but does not exempt carriers participating in arbitration from that process; (2)

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[24] As noted above, nothing in this proposal would prohibit Class II and Class III carriers from voluntarily participating in the arbitration process on a term basis.

there is a change in the law regarding rate disputes or the arbitration program; or (3) the number of arbitrations exceeds a designated limit.[25] Each of these bases for withdrawal is discussed in turn.[26]

1. Adoption of FORR/FORR Exemption.

Petitioners propose that a participating carrier be allowed to withdraw from the small rate case arbitration program if the Board adopts FORR in Docket No. EP 755 but does not exempt carriers participating in the program from the FORR process. (Pet. 17.) Petitioners state that, by agreeing to arbitrate under the program, they will be limiting their ability to appeal an adverse decision and, as such, it is essential that they have the right to exit the program if they become subject to what they describe as the "untested" FORR process. (Id. at 26.)

As noted above, several parties object to this aspect of the Petition. The Joint Shippers, USDA, and AFPM argue that a FORR exemption would allow railroads to force shippers to use arbitration regardless of whether the shippers prefer FORR, even though the Petitioners' proposed arbitration process cuts many of the elements of the FORR process that make it accessible. (Joint Shippers Reply 1; USDA Reply 2; AFPM Reply 4.) NGFA also objects, noting that an exemption from FORR would prevent its members from being able to "test" the reasonableness of rail rates under that process and proposes several alternatives (discussed above). (NGFA Reply 5.) NGFA and USDA suggest that the Board seek input on potential ways to resolve this particular issue. (Id. at 6-7; USDA Reply 2.)

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[25] The Petition also proposes that carriers participating in the program on an at-will basis would be permitted to withdraw any time at the carriers' discretion. Because the Board does not propose at-will participation, it need not address the Petition's proposed at-will withdrawal right.

[26] As noted above, the Board seeks comment specifically on whether its consideration of carriers' withdrawal rights should take into account the availability of other rate review processes.

In their supplemental filing, Petitioners assert that shippers opposed to this aspect of the proposed program overlook the fact that the RRTF identified arbitration as the ideal mechanism for resolving small rate cases, and argue that FORR was conceived as a workaround in the event that the Board did not obtain the statutory authority to require arbitration. (Pet'rs Suppl. 2.) As noted above, they also assert that the proposed arbitration program would be lawful and economically sound. (Id. at 2, 13.)

The Board will propose that any carrier that opts into the voluntary, small rate case arbitration program would be exempt from any final FORR rule adopted in Docket No. EP 755.[27] To be clear, inclusion of an exemption from FORR is not meant to indicate—one way or another—a commitment that the Board will adopt FORR at the same time as the small rate case arbitration program, or at some point thereafter, but instead simply accounts for the possibility of such an occurrence. Indeed, as explained above, the Board is seeking comments on the backstop issue and the circumstances under which it would be advisable to permit a carrier to withdraw from the arbitration program.

The Board understands the concern of the shippers who argue that allowing railroads to be exempt from FORR would eliminate shippers' ability to pursue resolution using FORR, if the Board were to adopt it. However, as explained above, the Board has long favored the resolution of disputes using alternative dispute resolution whenever possible and the RRTF found that arbitration would be an important means of providing shippers with access to potential rate relief, particularly in small cases. Creating a program in which carriers can obtain an exemption from any process adopted in the FORR docket in exchange for agreeing to arbitrate smaller rate disputes would

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[27] Petitioners do not propose specific language for an exemption from FORR in their Petition. As noted, they instead propose this as a withdrawal option. Accordingly, the Board is proposing its own FORR exemption language. See proposed § 1108.33. In response to a concern from NGFA, (see NGFA Reply 13), the Board will propose language that makes clear that carriers would only be exempt from the FORR process and shippers could continue to seek rate relief using the Board's other methodologies.

incentivize railroads to participate, and, in turn, create a means for shippers to obtain resolution through arbitration.[28] As such, the Board will propose—as part of this proposed rule—that participation in the proposed voluntary arbitration program would exempt a participating carrier from any process adopted in the FORR docket while the carrier is participating in the new arbitration program. The exemption would thereby terminate, for example, upon the effective date of carrier withdrawal, per exercise of the rights described below (if such withdrawal rights are adopted), or upon the effective date of any Board termination of the arbitration program, following the assessment proposed at § 1108.32 (see infra, Section XIII). An express exemption along these lines obviates the need to include the carriers' proposed opt-out provision as described above.

2. Change in Law.

Petitioners propose that both railroads and shippers[29] may withdraw their consent to arbitrate under the proposed program if there is a change in law; specifically, if the Board adopts a material change to its existing rate reasonableness methodologies, creates a new rate reasonableness methodology, or adopts a material change to the proposed arbitration program. (Pet. 17.) Petitioners contend that, because section 11708 requires that the arbitration panel consider the Board's methodologies for setting maximum lawful rates and appellate review of the panel's decision (discussed below) would be limited, "it is essential that parties have the right to opt out" of the proposed program should the Board either change the rules of the program or add to, or materially change, its rate

[28] Although parties can use the Board's existing arbitration process under 49 CFR part 1108 to resolve rate disputes, no parties have voluntarily opted into that process for purposes of arbitrating a rate dispute.

[29] Even though shippers would only participate in the proposed program on a case-by-case basis, it appears that Petitioners propose allowing shippers this withdrawal right to afford them the same ability to terminate pending arbitrations due to a change in the law.

reasonableness methodologies. (Id.) Petitioners propose that a participating carrier would file a withdrawal notice no later than 30 days after the qualifying event and that the notice would result in the immediate dismissal of any pending small rate case arbitration in which the arbitration panel has not yet issued an arbitration decision. (Id. at 17-18.)

NGFA proposes several modifications. First, it notes that another new methodology (the Rate Increase Constraint) has been suggested to the Board,[30] and that if this methodology were adopted after the proposed small rate case arbitration program is established, it would likely trigger the carriers' right to withdraw. (NGFA Reply 10-11.) NGFA argues that carriers participating in the proposed program should not be permitted to withdraw if this methodology is ultimately adopted. (Id. at 10-11, 13.) Second, NGFA argues that the Board should provide an opportunity for either party to challenge the other's contention that there has been a "material change" to the proposed program or to the agency's existing rate reasonableness methodologies. (Id. at 12-13.) Third, NGFA argues that pending arbitrations should not be terminated under the "change in law" scenario. (Id. at 13.) Fourth, NGFA requests clarification that once a carrier has withdrawn, a shipper can challenge the rate under any methodology, including FORR. (Id. at 13-14; see also Joint Shippers Suppl. 15 (expressing support for NGFA's clarification).)

In their supplemental filing, Petitioners do not agree with NGFA's suggestion that pending arbitrations be allowed to continue if there is a withdrawal for a change in the law. (Pet'rs Suppl. 12.) However, they do not object to shippers being allowed to

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[30] The Rate Increase Constraint was proposed by the RRTF. See RRTF Report 36-39. The Board held a hearing on revenue adequacy issues raised in the RRTF Report on December 12-13, 2019, and asked parties to address the RRTF recommendations—including the Rate Increase Constraint—in their written testimony and at the hearing. See Hr'g on Revenue Adequacy, Docket No. EP 761 et al. (STB served Sept. 12, 2019).

challenge whether a change in the law constitutes a "material change," and do not object to clarifying that, once a carrier has withdrawn from the proposed program, a shipper would be allowed to challenge under any of the Board's then-available rate-challenge methodologies, including FORR, if the Board were to adopt that process. (Pet'rs Suppl. 6-7.) Petitioners propose that any party would have five business days to challenge the withdrawal, and the carrier would have 14 calendar days to file a reply. (Id., App. A at 5.) The Chairman or an administrative law judge (ALJ) would have 14 calendar days to issue a decision, and any pending arbitrations would be stayed until the withdrawal issue is resolved. (Id.)

The Board will propose a provision allowing any party to withdraw due to a material change in the law. It would be reasonable for a carrier or shipper to withdraw from the proposed program, including any pending arbitration disputes, should the Board materially change the rules of that program or one of its methodologies, which could inform the arbitrators' decision.[31] *However*, the Board will propose that this withdrawal right would not apply to the adoption of a FORR process. In other words, carriers could not exercise the right to withdraw due to change in law if FORR is adopted at some point after the arbitration program has begun. Under the Board's proposal, carriers participating in the arbitration program would be exempt from FORR; as such, the potential subsequent adoption of FORR would not amount to such a regulatory change that would warrant allowing railroads the ability to reconsider their participation in the arbitration program.[32]

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[31] Although Petitioners propose the change-in-law opt-out right only for Board-enacted changes to the regulatory scheme, the Board sees no reason that the right should not also apply if there is a change in law resulting from Congressional or judicial action.

[32] Additionally, the proposed provision allowing for withdrawal where the Board materially changes an existing rate reasonableness methodology or creates a new rate reasonableness methodology would ***not*** be triggered where a litigant proposes and/or the arbitration panel adopts or applies any methodology—novel or otherwise—to resolve a

The Board disagrees with NGFA's suggestion that, if the Rate Increase Constraint is formally adopted by the Board as a rate review methodology, it should also not be considered a change in law allowing carriers to opt out. Adoption of this constraint would constitute a significant change in the regulatory scheme for railroad rates and, as such, the Board agrees that carriers should be given the opportunity to withdraw from the proposed small rate case arbitration program if the change were adopted. Similarly, the Board also will not propose NGFA's suggestion that all pending arbitrations continue if a carrier withdraws from the program due to a change in law. A change in the law that occurs after an arbitration has begun could impact how a party would have pleaded its case or whether it would have even participated in arbitration to begin with; accordingly, where there is a change in law falling under the applicable provision, pending arbitrations should be terminated if a party exercises its withdrawal right. However, parties are invited to comment on whether the Board should instead allow pending arbitrations to proceed, so long as the change in law is not applied to such pending arbitrations.

The Board will also propose that, if a party seeks to withdraw from the small rate case arbitration program based on a change in the law, other parties be permitted to challenge the withdrawal on the ground that the change is not material. See proposed § 1108.23(c)(2)(ii). There are many scenarios in which the materiality of a change in the law could be in dispute. Petitioners state that they have no objection to this proposed modification. (Pet'rs Suppl. 6.) However, the Board will make some adjustments to Petitioners' proposed procedures for challenging materiality. Instead of permitting a

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particular arbitration brought under this proposed program. Nor would it be triggered where the arbitration panel adopts or applies such a methodology and its decision is affirmed by the Board under the limited grounds for appellate review described in Section XI, infra. As discussed in Section IX, infra, parties would be able to urge the arbitration panel to consider modified or entirely new rate review methodologies but, of course, would have to persuade the arbitrators that such methodologies comply with the statutory provisions governing both the panel's decision and reasonableness of rates.

party 30 days to withdraw due to a change in law, the Board will propose a 10-day window.[33] Parties should be able to decide whether to continue participating in the proposed small rate case arbitration program fairly quickly after a change in law is adopted. So that other parties are aware of a party's withdrawal, the Board will propose that it post a copy of the notice on its website and that the carrier serve a copy on any party with which it is currently engaged in arbitration.

Additionally, the Board will clarify that an objection to a party's withdrawal should be filed as a petition to the Board in a formal docket. Instead of providing five days for an opposing party to challenge a carrier's withdrawal due to a change in the law, the Board will propose a 10-day window. The Board will also propose that the withdrawing party have five days to reply to the petition (instead of the 14 days proposed by Petitioners) and that the petition shall be resolved by the Board within 14 days from the filing deadline for the withdrawing party's reply. These timeframes are all reasonable and will provide for expeditious resolution of the relevant issues. The Board will also propose that such petitions be decided by the Board, rather than the Chairman or an ALJ, as the impacts of a decision regarding materiality could be widespread. The Board invites parties to comment on whether additional modifications are needed.

3. Case Volume.

Petitioners propose that a railroad that has opted into the proposed small rate case arbitration program on a term basis may also withdraw its consent to arbitrate under the program if it faces more than 25 arbitrations in a rolling 12-month period, or more than 10 simultaneous arbitrations. (Pet. 18.) Petitioners note that they do not expect that volume, but they want to be able to reassess their long-term commitment to the program should they face so many simultaneous arbitrations. (Id. at 26.) Under their proposal,

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[33] Unless otherwise specified, any reference to "day" in the decision or regulations refers to calendar days.

withdrawal would not affect arbitration disputes under the proposed program in which the parties have at least started their first mediation session,[34] but would result in the discontinuance of all disputes that have not yet progressed to that stage. In response, NGFA argues that withdrawal should not result in the dismissal of any pending arbitrations.[35]

The Board will not propose a right to withdraw from the arbitration program based on case volume but will instead propose limiting the number of arbitrations that a carrier can be subject to during a rolling 12-month period. Because participation in Board-sponsored arbitration is voluntary, as required under 49 U.S.C. 11708, and because this program would be new, it is reasonable that a carrier who has agreed to participate for a term of years only be required to arbitrate a certain number of cases. However, rather than allowing carriers that reach such a limit to withdraw from the program, the Board believes that it would be more appropriate for carriers to remain in the program but without having to face additional arbitrations. Accordingly, the Board will propose that arbitrations that would exceed the 25-cases/12-month limit would be postponed until such time as they would not exceed the 25-case/12-month limit. In addition, under the Board's proposal, cases will only count towards the 25-arbitration/12-month limit discussed above upon commencement of the first mediation session or, where one or both parties elect to forgo mediation (as discussed below in Section IV.B), submission of the joint notice of intent to arbitrate to the Board. See infra Section IV.C. The Board sees no reason an arbitration should count toward the case limit if it is concluded before parties have expended much time or resources.

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[34] See infra Section IV.B.

[35] In its reply, NGFA does not specify if its objects to the termination of pending arbitrations based on withdrawal due to a change in the law or case volume. The Board assumes that it opposes termination of pending arbitrations in both instances.

Regarding the Petitioners' proposal to allow carriers to withdraw after reaching 10 simultaneous arbitrations, this strikes the Board as a far lesser threshold and a more likely occurrence. Accordingly, the Board will not include a right to withdraw for instances in which there are 10 simultaneous arbitrations (or require that any additional arbitrations above this amount be postponed). The one-case per shipper restriction (discussed below in Section III) and the 25-case limit within a 12-month period should be sufficient to ensure that a carrier is not inundated with arbitrations, while also providing shippers access to an alternative dispute resolution process.

To implement the 25-case/12-month limit, the Board will propose that where a carrier receives a notice of intent to arbitrate from a shipper that would initiate an arbitration exceeding the limit, the carrier may inform the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), as well as inform the shipper who initiated the arbitration. Under the proposal, that arbitration (and any arbitrations that are subsequently initiated) would be postponed until the number of arbitrations is once again below the 25-case/12-month limit. OPAGAC would notify the shippers whose arbitrations are postponed.

III. One-Case Limit

Petitioners propose that a shipper not be permitted to bring more than one arbitration at a time against a participating railroad. (Pet. 11.) Petitioners contend that this limitation is needed to prevent shippers from avoiding the relief cap by splitting or "disaggregating" a case that could be brought as a single rate challenge into multiple cases. (Id. at 11, 27.) They propose that shippers would, however, be permitted to challenge rates for multiple traffic lanes in the same arbitration. (Id. at 11.) They propose that once the arbitration panel issues its decision, the shipper would be free to

bring another small rate case arbitration against that same participating carrier. (Id. at App. A at 5.)

Olin and U.S. Wheat argue that the one-case limitation is one of several reasons why proceeding with FORR is preferable. (Olin Reply 11; U.S. Wheat Suppl. 7.) Olin notes that, because of this limitation, shippers would have to aggregate separate claims, yet the rate cap would apply regardless of whether a shipper is challenging a single rate or multiple rates, whereas the proposed FORR process includes no such limitations. (Olin Reply 11.) In their supplemental filing, Petitioners respond that shippers are not required to aggregate claims, and that the one-case limit is intended instead to prevent the improper disaggregation of large rate claims to take advantage of the arbitration process. (Pet'rs Suppl. 18-19.)[36]

The Board will propose a one-case limit as part of the proposed arbitration program. The Board has noted its concern about the possibility of shippers filing a number of small rate cases when it would be more appropriate for those rates to be challenged as part of one larger case. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 32-33 ("The Board has ample discretion to protect the integrity of its processes from abuse, and we should be able to readily detect and remedy improper attempts by a shipper to disaggregate a large claim into a number of smaller claims, as the shipper must bring these numerous smaller cases to the Board."); see also E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., Docket No. NOR 42099 et al., slip op. at 3 (STB served Jan.

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[36] NGFA states that the Board should clarify that the one-case limit prevents the filing of an additional case against the same carrier only up until the point at which the original arbitration decision in the first case is issued, regardless of whether that decision is appealed. (NGFA Reply 12; see also Joint Shippers Suppl. 10.) The text of Petitioners' proposed regulations (which the Board includes in its proposal) states that the limit resets "when the arbitral panel issues its arbitration decision." (Pet., App. A at 5.) Accordingly, NGFA's request for further clarification does not appear to be necessary. However, the Board will propose language stating that the limit also resets when an arbitration is withdrawn or dismissed, including instances in which the parties reach a settlement. See proposed § 1108.24(c).

22, 2008). In those cases, the Board indicated that it would monitor shipper filings to ensure that no such abuse of its processes occurs. In the arbitration context, however, this would not be possible. As discussed below (see infra Section XI), arbitrations would be kept confidential from the Board (at least until an appeal), so the Board would be unaware of what rates a shipper has currently challenged. It would also be impractical to leave such oversight to arbitration panels. Again, arbitrations would be confidential and presumably handled by different arbitration panels, making it difficult for any given panel to assess aggregation issues.

Concerns over disaggregation of rate challenges aside, a one-case limit would be beneficial by ensuring that more shippers have the opportunity to participate in the arbitration program. For example, if a single shipper were to file 25 rate arbitrations against a carrier simultaneously and thus reach the volume cap (discussed above), that would delay other shippers from pursuing their own arbitrations against that carrier because those cases would be postponed. In general, limiting the number of cases brought would also allow the Board and stakeholders to develop familiarity with the arbitration process gradually.

The Board acknowledges that a one-case per-carrier-limit would affect the relief available to shippers (at any given time) that want to bring multiple cases against the same carrier simultaneously. However, the Board anticipates that the shippers most likely to use this arbitration process, including its limitations on relief, may be less likely to bring multiple cases against the same carrier. As the Joint Shippers state, "many small shippers probably would not have enough qualifying captive lanes to bring multiple disputes." (Joint Shippers Suppl. 6.) Moreover, shippers would still be able to arbitrate multiple cases against different carriers at the same time. Finally, for those shippers that want to bring multiple cases for rates charged by the same carrier, the Board's formal rate

reasonableness procedures remain available, including those designed for smaller disputes.

However, the Board invites parties to comment on the impact and appropriateness of the proposed one-case limit and whether there are other methods of dealing with the issue of disaggregation. For example, other possible approaches include allowing a shipper to bring two (or more) concurrent arbitrations so long as the lanes at issue do not share facilities, or permitting a second arbitration to be brought after the close of the evidentiary record—rather than awaiting the decision of the arbitration panel—in a pending arbitration (thereby allowing a second arbitration to be brought sooner).[37]

IV. Pre-Arbitration Procedures and Timelines

A. Initial Notice.

Petitioners propose that a shipper wishing to arbitrate a small rate dispute using the proposed program submit to the participating carrier a written notice of its intent to arbitrate, which must include information sufficient to indicate the dispute's eligibility for arbitration.

The Board agrees, and it will propose that the arbitration process be initiated by a shipper's submission of a written notice (referred to herein as the Initial Notice) to the participating carrier that includes information demonstrating that the dispute qualifies for the proposed small rate case arbitration program. The Initial Notice would serve as the formal initiation of the arbitration process and would also ensure that shippers are participating in arbitration voluntarily, consistent with section 11708. (Carriers'

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[37] The Board notes that although shippers would not be able to challenge rates in simultaneous arbitrations under the one-case limit, there would be no limit on the number of rates they could challenge within a single arbitration, though the $4 million/two-year relief cap would apply. The Board further notes that shippers are not prohibited from challenging multiple rates charged by the same carrier in sequential arbitrations.

voluntary participation would be evidenced through their opt-in notice, see supra Section II.A.)

However, unlike Petitioners' proposal, the Board will propose that the shipper also submit a copy of the Initial Notice to OPAGAC. This would allow OPAGAC, which oversees the agency's alternative dispute resolution processes, to be informed when the arbitration process is being used as it happens (rather than learning about it after the fact). As noted above, this would also help OPAGAC monitor the number of pending arbitrations to determine if the 25-cases/12-month limit has been reached.[38] However, specific information regarding pending arbitrations, including the identity of the parties, would not be disseminated within the Board beyond the alternative dispute resolution functions within OPAGAC. The Board will propose that the Initial Notice be submitted by e-mail to *rcpa@stb.gov*.

The Board also will propose that OPAGAC provide a letter to the parties confirming initiation of the process. As discussed in more detail below, the Board will further propose that the Initial Notice and the OPAGAC confirmation letter be kept confidential.

B. Mediation.

Petitioners propose that, following the shipper's submission of the Initial Notice, the parties then engage in pre-arbitration mediation, conducted outside of any Board process and directed by a mediator designated by the parties. Under Petitioners' proposal, the mediation period would be 30 calendar days, beginning on the date of the

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[38] As noted above, in instances where the Initial Notice initiates an arbitration exceeding the 25-case/12-month cap, the Board will propose that the carrier may notify OPAGAC, as well as the shipper who submitted the Initial Notice to the carrier. Under the Board's proposal, OPAGAC would then confirm that the cap has been reached and inform the shipper (and any other subsequent shippers) that the arbitration is being postponed, along with an approximation of when the arbitration can proceed and instructions for reactivating the arbitration once the carrier is again below the cap.

first mediation session. (Pet., App. A at 5.) Olin responds that requiring mediation would only serve to establish another roadblock to timely rate relief, and notes that the Board only proposed requiring mediation under the FORR process if both parties consent. (Olin Reply 10.) NGFA proposes that parties be allowed to agree by mutual consent to waive mediation. (NGFA Reply 9.) It also proposes that mediation last no more than 30 days, whereas Petitioners suggest that it last a minimum of 30 days. (Id.) Lastly, NGFA proposes that the Board liberally grant requests to extend the mediation period if the parties agree. (Id.) In its supplement, Petitioners agree with NGFA's proposed changes, but note their belief that it would not be necessary for the parties to obtain extensions of the mediation period from the Board. (Pet'rs Suppl. 5.)

The Board observes that a mediation requirement may help facilitate settlement. If a dispute can be settled through mediation, it would allow parties to avoid the expense of arbitration. However, the Board also agrees with several shipper interests that, in some instances, the parties may have already engaged in extensive negotiations and therefore may wish to proceed directly to arbitration. (NGFA Reply 9; Olin Reply 10.) The Board will propose allowing parties to engage in mediation prior to the arbitration phase if they mutually agree, but they will not be required to do so. If one or both parties decide that they do not want to mediate, they may proceed directly to arbitration. The Board notes that this approach does not mirror the proposal in FORR, where the agency is proposing that mediation be mandatory, consistent with existing rate reasonableness procedures used in adjudications before the Board. See FORR SNPRM, EP 755, slip op. at 38 (STB served Nov. 15, 2021). However, arbitration, like mediation, is itself a form of alternative dispute resolution, and requiring parties to engage serially in two forms of alternative dispute resolution as an alternative to adjudication could discourage parties from using the arbitration process in some instances. In addition, allowing parties the option of bypassing mediation would expedite the process, which is one of the central

goals of arbitration. Parties are invited to comment on whether, alternatively, the mediation phase should be eliminated entirely.

The Board also agrees that, as a default, a 30-day mediation period would provide sufficient time for the parties to mediate while also ensuring that the overall arbitration process progresses. Accordingly, the Board will propose that the default mediation period shall be 30 days, measured from the date of the first mediation session, but that the parties may agree to a longer or shorter mediation period. As for timing, the Petition does not state how long after the Initial Notice is filed that mediation should begin. Accordingly, the Board will propose that the parties would be required to schedule their first mediation session "promptly and in good faith" after the Initial Notice is submitted to the participating carrier. See proposed § 1108.25(b). Parties are invited to comment on whether a more defined period should be adopted. As for extensions of the mediation phase, because the mediation would not be conducted by the Board, there would be no need for the parties to seek Board approval of an extension of the mediation period.

C. Joint Notice to Arbitrate.

Petitioners propose that, if mediation is unsuccessful, the parties submit to OPAGAC a joint notice of their intent to arbitrate under the proposed program. (Pet., App. A at 5.) The Board will propose that the parties file a joint notice to arbitrate (referred to herein as the Joint Notice)—which would include the basis for the Board's jurisdiction over the dispute and the basis for the parties' eligibility to participate in the proposed small rate case arbitration program[39]—with the Board when mediation is unsuccessful or if the parties do not agree to mediate. As with the Initial Notice, specific information regarding pending arbitrations that is contained in the Joint Notice, including

[39] Because the Board will propose that parties not be required to participate in mediation, the Board does not propose to require that the parties state in the Joint Notice that they have engaged in mediation.

the identity of the parties, would not be disseminated within the Board beyond the alternative dispute resolution functions within OPAGAC. The Board will also propose that the Initial Notice be submitted by e-mail to *rcpa@stb.gov*.

Petitioners further propose that the Joint Notice include "the parties' agreement to arbitrate under the rules of this part." (Pet., App. A at 6.) It is unclear if the Petitioners intended for this requirement to simply mean a general statement that they agree to arbitrate or a written arbitration agreement, as is required in the existing arbitration regulations. See 49 CFR 1108a.5(g). Regardless, the Board will not propose that either requirement be part of the Joint Notice, so as to maintain the confidentiality of the Joint Notice. (See infra Section XI-B.)

Petitioners also propose that the Joint Notice indicate the "requested relief," which presumably would include whether the parties have agreed to a different relief cap than set forth in the regulations. (Pet., App. A at 5-6.) As discussed in Section IX below, the Board will propose a relief cap of $4 million per arbitration. The parties' decision on whether to agree to a different relief cap may not be known at the time they submit the Joint Notice. Accordingly, the Board will propose that any agreement to a different relief cap be noted in the confidential summary filed at the conclusion of the arbitration (see infra Section XI), rather than in the Joint Notice.

The Petition includes no deadline for filing the Joint Notice after mediation has concluded. The Board will propose that the Joint Notice be submitted not later than two business days following the end of mediation (even if mediation concludes before the end of the 30-day mediation period). See proposed § 1108.25(c)(1). This would ensure that the process under the arbitration program continues to move forward in a timely manner. The Board will propose that the Joint Notice be submitted by e-mail to *rcpa@stb.gov*.

V. Arbitration Panel Selection and Commencement.

The Petition proposes that arbitration under the proposed program be conducted by a panel of three arbitrators, the selection of which would not be limited to the arbitration roster established at 49 CFR 1108.6(b). (Pet. 12.) Petitioners acknowledge that the existing arbitration program at part 1108 requires selection of an arbitrator from the Board's arbitration roster, but contend that permitting parties to select arbitrators not on the Board's roster would allow them to select an arbitrator with particular expertise in the market for the relevant commodity, an arbitrator with whom the party had a good experience in a previous non-rate arbitration, or another qualified individual that a party believes would be qualified to arbitrate the case, regardless of that person's inclusion on the Board's arbitration roster. (Id. at 23-24.) Petitioners believe that such flexibility would remove a potential barrier to parties wishing to arbitrate their rate dispute. (Id. at 24.)

Under Petitioners' proposal, each party would select one arbitrator, and the two party-selected arbitrators would then select the third arbitrator from a list compiled jointly by the parties. (Id.) The Petition proposes that each party may object to the other's selected arbitrator "for cause," including, among other things, a conflict of interest or actual or perceived bias toward the objecting party. (Id.) The arbitrator selected by the two party-selected arbitrators would serve as the panel's lead arbitrator, and would be responsible for establishing all rules deemed necessary for each arbitration proceeding—including those with regard to discovery, the submission of evidence, and the treatment of confidential information—as well as generally ensuring that the arbitration procedures are followed. (Id., App. A at 6-7.) Any disputes over the selection of party-appointed arbitrators or the lead arbitrator would be resolved by the Chairman. (Id.) These processes would also be used to replace an arbitrator unable to serve due to incapacitation. (Pet., App. A at 6-7.) Each party would pay the cost of its selected arbitrator, and the parties would share the cost of the lead arbitrator. (Id.)

Olin responds that the fact that the parties would have to pay for the arbitrators and could object to each other's arbitrators on grounds not provided for under the existing arbitration rules (such as "perceived bias or animosity" and "adverse business dealings") make the proposed program inferior to FORR. (Olin Reply 11.) Similarly, U.S. Wheat argues that having to pay for arbitrators makes arbitration more costly than FORR. (U.S. Wheat Suppl. 6.)

A. Eligible Arbitrators.

The Board agrees that permitting parties to select arbitrators who are not on the Board's arbitration roster may better incentivize parties to participate in the small rate case arbitration program, and so will propose allowing parties to select arbitrators not on the Board's roster. Although section 11708 provides for the selection of arbitrators possessing certain qualifications from the Board's arbitration roster as a default, that default applies only where the parties have not "otherwise agreed" to a different selection process. In other words, as Petitioners point out, section 11708 explicitly permits the use of non-roster arbitrators by mutual consent. The Board will propose requiring carriers and shippers to affirmatively state their agreement to potentially use non-roster arbitrators in their opt-in notice and the Initial Notice, respectively.

Under section 11708(f)(1), to be included on the Board's roster of arbitrators, a person must have "rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector." The Board's regulations further require that "[p]ersons seeking to be included on the roster must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution." 49 CFR 1108.6(b). However, as discussed above, because parties would not have to select arbitrators from the Board's roster under the proposed program, these requirements would not necessarily apply to arbitrations under proposed 49 CFR part 1108, subpart B. Although the proposed regulations do not include specific qualification requirements for

non-roster arbitrators, the Board invites comment on whether the 49 CFR 1108.6(b) qualifications (or others) should be required for arbitrators under the proposed program, particularly for the lead arbitrator in light of their responsibilities concerning discovery, evidence, and confidentiality.

B. Arbitrator Selection.

The Board will propose allowing parties to object to the opposing side's selected arbitrator for cause. The bases for objection proposed by Petitioners would be consistent with section 11708. Moreover, because parties would not necessarily select arbitrators that have been approved by the Board via its roster, the parties should have the ability to seek to disqualify individuals where there are substantial and legitimate questions as to whether such persons can satisfy the independence requirements of section 11708(f)(2).[40] In response to Olin's concern, the Board will propose language that specifically ties for-cause objections to the independence requirements of section 11708(f)(2). See proposed § 1108.26(b)(1).

The Board will propose that any for-cause objections be ruled on by an ALJ rather than the Chairman.[41] This would help ensure that the Chairman does not become aware of the arbitration during its pendency. The ALJ would also be well-equipped to rule on this matter. The Board will propose that the hearing before the ALJ can still be held telephonically (or virtually) and under the same expedited timelines proposed by

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[40] The Board notes that Petitioners propose that parties may choose party-appointed arbitrators "without limitation." (Pet., App. A at 7.) Theoretically, this would allow a party to select one of its own employees. However, if a party were to do so, the opposing party could object and seek to have that individual stricken for cause over concerns about the individual's ability to "perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence." section 11708(f)(2). Nonetheless, the Board expects that for-cause challenges would be invoked rarely, such as when an arbitrator has financial ties to a party.

[41] The Board has a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of its ALJs on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in pending Board cases.

Petitioners. Parties raising objections would inform OPAGAC, which will then help arrange the hearing with the ALJ.

The Board will propose that the ALJ's ruling on the objections be issued in a short, written order rather than a ruling during the telephonic or virtual conference. As discussed in more detail in the section on confidentiality, see infra Section XI, the Board will propose that the ALJ's order be deemed confidential. The Board also invites parties to propose alternative means of addressing for-cause objections, such as having the objections ruled on by one of the agency's directors or if they would prefer such rulings to be made by the Chairman.

Additionally, the Board will not include Petitioners' proposal that the Chairman select the lead arbitrator if the party-appointed arbitrators are unable to agree. Such a determination is best left to the party-appointed arbitrators and would ensure that the Chairman does not become aware of the arbitration during its pendency, as mentioned above. Accordingly, the Board will propose that, if the party-appointed arbitrators cannot agree, they shall select from the Board's roster of arbitrators using the alternating strike method set forth in 49 CFR 1108.6(c). See proposed § 1108.26(c)(2). Parties may suggest alternative methods in their comments.

C. Cost of Arbitrators.

Under section 11708(f)(4), "[t]he parties shall share the costs incurred by the Board and arbitrators equally, with each party responsible for paying its own legal and other associated arbitration costs." As such, the Board will propose that parties pay the cost for their own arbitrator, consistent with the requirements of 49 U.S.C. 11708(f)(4). Olin and U.S. Wheat argue that this is a cost that shippers would not incur in a FORR

case. However, the Board notes that parties are required to pay the costs for arbitration under section 11708(f)(4) and 49 CFR part 1108, subpart A. See 49 CFR 1108.12(b).[42]

The statute does not specify how "shar[ing] the costs … equally" would apply in arbitrations in which there are three or more parties. Under Petitioners' proposal, the shipper and defendant "carrier(s)" would each pay one-half of the cost of the lead arbitrator. This means that if a shipper challenges a multi-carrier rate, the shipper would bear 50% of the cost of the lead arbitrator while the defendant carriers would split the remaining 50% cost among themselves. However, this may be contrary to Congress' intent. For example, if a shipper challenges an interline rate by two carriers, "shar[ing] the costs … equally" could be interpreted as meaning that the parties should divide the costs three ways (with each party paying an equal third). Given the ambiguity in the statute, the Board will propose that parties to arbitration "will share the cost of the lead arbitrator equally," mirroring the language from the statute.[43] See proposed § 1108.26(c)(4). This language would give the parties in an arbitration with three or more parties flexibility to negotiate each party's share of the lead arbitrator's cost on either a per-side or per-party basis.

D. Selection Period.

The Board will propose adopting Petitioners' suggested deadlines for arbitrator selection. (See proposed § 1108.26.) The Board acknowledges that 49 U.S.C. 11708(e)(1) states that "[a]n arbitrator or panel of arbitrators shall be selected not later than 14 days after the date of the Board's decision to initiate arbitration." Under the proposed program, arbitrator selection may not be complete within 14 days if the

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[42] If the Board ultimately adopts this proposed arbitration program, it could consider the possibility of creating a system in which the agency pays the party-selected arbitrator's costs for parties that are able to demonstrate financial hardship.

[43] See 49 CFR 1108.12(b) (adopting the exact text of the statutory language regarding arbitration costs).

parties choose to engage in mediation. However, 49 U.S.C. 11708(e)(4) permits the Board to extend the timelines upon the agreement of all parties in the dispute. Accordingly, the Board will propose that, as part of its opt-in notice, a railroad provide the Board with a statement that it agrees to extend the 14-day deadline in any arbitration brought under the program. In addition, the Board will propose that a shipper include, as part of the Initial Notice that is served on the participating carrier and OPAGAC, a statement that it likewise agrees to extend the arbitrator selection deadline. The letter from OPAGAC confirming initiation of the arbitration process (see supra Section IV-A) would include a confirmation of the parties' agreement to an extension (as well as their agreement to allow for the selection of non-roster arbitrators).

E. Arbitration Commencement.

The Board will propose that, within two business days after the arbitration panel is selected, the lead arbitrator shall commence the arbitration process in writing, consistent with Petitioners' proposal. (Pet., App. A at 7.) The Board notes that 49 U.S.C. 11708(c)(1)(D) requires that arbitration commence not later than 40 days after the date on which a written complaint is filed "or through other procedures adopted by the Board in a rulemaking proceeding." Under the Board's proposal, it is possible that the arbitration phase may not begin within 40 days from the submission of the Initial Notice, due to the presumptive 30-day mediation requirement (which, again, the parties can forgo if they do not mutually consent). However, the Board finds no inconsistency with the 40-day statutory requirement, as it considers the mediation phase to be part of the overall "arbitration process."

F. Arbitration Agreement.

Petitioners propose a provision that would require that the rules of the Small Rate Case Arbitration Program be incorporated by reference into any arbitration agreement into which the parties enter. (Pet., App. A at 6 (proposed § 1108a.5(d)).) Petitioners'

proposal appears to make the need for an arbitration agreement discretionary. However, an agreement signed by all participants to the arbitration helps ensure that the issues for the arbitration panel are clear and the participants take the time to familiarize themselves with the arbitration rules. Accordingly, the Board will propose a requirement that the parties, with the help of the arbitration panel, create a written arbitration agreement. See proposed § 1108.27(b). The Board has modeled this provision on the regulation from the existing arbitration process. See 49 CFR 1108.5(g).

VI. Record-Building Procedures

Petitioners propose that, once the arbitrators are selected, there would be a 45-day period for the parties to engage in limited discovery and that the arbitration panel has discretion to set the schedule and prescribe the format of the parties' evidence. (Pet. 13, 15.) They also propose that the Board's Office of Economics (OE) provide unmasked confidential Carload Waybill Sample data—subject to certain commodity and time limitations—to each party within seven days of filing the Joint Notice with OPAGAC. (Id. at 13.)

A. Procedural Schedule.

There appear to be several inconsistencies between what Petitioners propose in the body of their Petition and the text of their proposed regulations in Appendix A of their Petition regarding the procedural schedule for arbitration. For example, with respect to the 45-day discovery process, the Petition is unclear as to when that 45-day period would commence. (Compare Pet. 13 (the date on which the Joint Notice is filed) with Pet., App. A at 7 (the arbitration commencement date, which is two business days after the arbitration panel is appointed). With respect to terminology, the Petition refers to a 45-day period for discovery, (Pet. 13), but the proposed regulations themselves refer not to a discovery period but a 45-day "evidentiary phase," (Pet., App. A at 7), which could presumably encompass more than just discovery (e.g., submission of pleadings and

evidence). In addition, Petitioners state that the procedural schedule for the submission of pleadings or evidence will be set by the "arbitration panel," (Pet. 15), even though they have indicated that the "lead arbitrator" shall establish all rules deemed necessary for arbitration, including with regard to "the submission of evidence," (Pet., App. A at 6-7).

The Board will propose a procedural schedule, consistent with section 11708, beginning with a 90-day evidentiary phase comprised of 45 days for discovery and an additional 45 days for the submission of pleadings or evidence. Although the arbitration panel may extend the "discovery sub-phase" upon request, the Board will propose that this would not automatically extend the entire evidentiary phase beyond 90 days. See proposed § 1108.27(c). In other words, if the "discovery sub-phase" were extended, the "submission sub-phase" would be correspondingly shortened. However, the parties may agree to extend the entire evidentiary phase or a party may request an extension from the arbitration panel.[44] Furthermore, the discovery/evidentiary phase would run from commencement of the arbitration (i.e., two business days after the arbitration panel is appointed), not from the submission of the Joint Notice. See proposed § 1108.27(c)(2). This would ensure that the days needed for arbitration panel selection are not counted as part of the discovery/evidentiary phase. Accordingly, because the Board's proposed procedural schedule may not conclude within the timeline set forth in section 11708 if the parties engage in mediation, the Board will require carriers and shippers that utilize the

[44] Petitioners propose that the evidentiary phase only be extended upon mutual agreement of the parties. (Pet., App. A at 7.) This may have been an effort by Petitioners to subject arbitration to rigid deadlines comparable to those proposed in Final Offer Rate Review, EP 755 (STB served Sept. 12, 2019). However, section 11708(e)(2) permits parties to make, and for the arbitration panel to grant, unilateral requests for an extension. In keeping with the statute, the Board will permit unilateral requests for extension, but notes its expectation that the arbitration panel will grant such extensions only in extraordinary circumstances and should attempt to adhere to the 90-day default evidentiary period set forth in the statute to the greatest extent practicable.

proposed small rate case arbitration process to provide their consent to extend these deadlines in their opt-in notice and Initial Notice, respectively.

Olin states in its reply that Petitioners "seek to enable a defendant a fair opportunity to respond to the complainant shipper's case-in-chief, but fail to provide for shipper rebuttal and the right to be able to close the record," as provided for under the proposed FORR process. (Olin Reply 12.) It is the Board's view that the lead arbitrator should set the schedule and format of the parties' evidence, as is currently provided for in the existing arbitration regulations. See 49 CFR 1108.7(b). Arbitration is intended to be a flexible process, and the lead arbitrator will be able to set rules for the presentation that best suit the nature of the dispute, with the input of the parties. The lead arbitrator may, of course, confer with the other arbitrators on the panel regarding these matters.

B. Discovery Limits.

The Board will propose limiting discovery to 20 written document requests, five interrogatories, and no depositions, as suggested by Petitioners. These limits would be broad enough to allow each party to obtain the information necessary to make its case to the arbitration panel, but not so broad as to place an extensive burden on the opposing party and necessitate a prolonged discovery phase.

Olin argues that discovery limitations are another instance where the proposed program would be inferior to the FORR process which, as proposed, includes no limitations on discovery. (Olin Reply 11.) However, arbitration is intended to be a streamlined process that reduces the costs and time often associated with adjudication. The Board invites parties to comment on these proposed limits; in particular, parties are invited to comment on whether broader discovery should be allowed in light of the fact that the Board is proposing that shippers may use a non-streamlined presentation to establish market dominance. See infra Section VII.B.

Again, the Board will propose that the lead arbitrator—not the arbitration panel—be responsible for managing discovery, the submission of evidence, and the treatment of confidential information, consistent with the requirements of the existing arbitration process. See 49 CFR 1108.7(b).

C. Waybill Data.

Petitioners propose that each party in the arbitration automatically be given access to Waybill data that contains: (a) the most recent year, (b) movements with a revenue to variable cost (R/VC) ratio above 180%, (c) movements on the defendant carrier, and (d) movements with the same five-digit Standard Transportation Commodity Code (STCC) as the challenged movements. They propose that, should a party need more data than provided in this automatic release, it may "seek broader release of the STB Waybill Sample pursuant to existing procedures" or through discovery. (Pet. 13.)

The Joint Shippers respond that automatic release of Waybill data should not be limited to only one year. They note that the Board allows the release of up to four years of data in Three-Benchmark cases, as one year of data was deemed insufficient in those cases to provide a meaningful benchmark for comparison purposes. (Joint Shippers Suppl. 11.) The Joint Shippers also suggest that the Waybill data should not be limited to the same five-digit STCC as the commodity at issue. They note that some commodities, particularly chemicals, have similar characteristics and argue that guaranteeing access to Waybill Data at the two-digit STCC level will provide more relevant data for performing a comparative analysis. (Id. at 12.) The Joint Shippers further argue that the Waybill data should not be limited to only the defendant carrier but should be provided for all railroads, as limiting guaranteed access to only the defendant carrier's Waybill data could prevent shippers from relying on methodologies that consider movements on other railroads, including the ACC's proposed benchmarking methodology. (Id.) Finally, the Joint Shippers note that the carriers' suggestion that such Waybill data could be sought

through the standard Waybill access procedures or discovery requests would "defeat the advantages of arbitration by adding to the time and expense." (Id.)

In their supplemental filing, Petitioners state that they disagree that more Waybill data should be required as a matter of right. (Pet'rs Suppl. 18 n.27.)

1. Waybill Data: Time Period, Commodity, and Carrier.

The Board will propose a provision that requires the automatic disclosure of confidential Waybill data to each party to an arbitration, but for the preceding four years rather than the one year proposed by Petitioners. See proposed § 1108.27(g). The Joint Shippers correctly point out that the Board allows parties in Three-Benchmark cases access to the unmasked Waybill Sample data of the defendant carrier for the four years that correspond with the most recently published Revenue Shortfall Allocation Methodology (RSAM) figures. See Waybill Data Released in Three-Benchmark Rail Rate Procs., 77 FR 15969 (March 19, 2021), EP 646 (Sub-No. 3) (STB served Mar. 12, 2012). As noted above, the arbitration panel would be required to consider the Board's methodologies for setting maximum lawful rates. Parties may wish to present arguments to the panel on what a reasonable rate would be under the Three-Benchmark methodology,[45] which would require the same access to the Waybill sample as permitted in such proceedings. Moreover, the Board has previously indicated that there are additional benefits to providing four years of data. Waybill Data, EP 646 (Sub-No. 3), slip op. at 5, 9 (finding that more years of data would increase the number of observations of comparable traffic and allow for an assessment of changes in railroad pricing over a period of years).

[45] See Waybill Data, EP 646 (Sub-No. 3), slip op. at 5 ("[A] party may, for example, select its comparison group from data across all four years and argue that a group selected from all four years is the most comparable to the movements at issue.").

The Board will not, however, propose that the Waybill data that is automatically disclosed include commodities at the two-digit STCC level or railroads that are not parties to the arbitration. While arbitration disputes may involve attempts by shippers to demonstrate rate unreasonableness based on a comparison of rates between the arbitrating carrier and other carriers, not all arbitrations will involve such arguments. Given the importance of maintaining the confidentiality of the Waybill Sample, it would be imprudent to require the release of data that may not needed in some cases. Instead, if a party desires access to the Waybill Sample for data regarding other years, other commodity traffic of the defendant carrier, or other carriers, the Board will propose that the party file a request pursuant to 49 CFR 1244.9(b)(4). As with requests for Waybill data in other contexts, see 49 CFR 1244.9(a), the Director of OE will determine if the request satisfies the requirements of § 1244.9(b)(4).[46]

Whether determinations by the Director of OE for Waybill data under § 1244.9(b)(4) would be considered an "opinion" or "order" that must be made available for public inspection under the Freedom of Information Act (FOIA) is unclear. See 5 U.S.C. 552(a)(2). The Board will propose that the Director's determinations would not be posted in a formal docket (as such determinations are for formal proceedings and "other user" requests), though parties are free to comment on whether or not publication is required under FOIA. It should be noted, however, that even if the Board were to

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[46] The Board does not permit complainants in Three Benchmark proceedings to include non-defendant carrier traffic in its comparison group. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 82-83. However, under the proposal here, shippers would be permitted to present new or modified rate reasonableness methodologies that consider additional market-based standards, among other factors. (See infra Section IX.A.1.) See also Expanding Access to Rate Relief, EP 665 (Sub-No. 2), slip op. at 14-15 (STB served Aug. 31, 2016) (seeking comment on whether to allow comparisons of non-defendant traffic). Accordingly, it is possible that requests for non-defendant carrier Waybill data could satisfy the criteria of 49 CFR 1244.9(b)(4), including that "[t]he STB Waybill Sample is the only single source of the data or obtaining the data from other sources is burdensome or costly, and the data is relevant to issues pending before the Board" or arbitration panel. 49 CFR 1244.9(b)(4)(i).

conclude the Director's determinations do not need to be made public, such documents may nonetheless have to be made available in response to a FOIA request under 5 U.S.C. 552(a)(3). (See infra Section XI.B for further discussion of issues with confidentiality and FOIA in this proposed arbitration process.)

Lastly, the Board will not propose permitting shippers to obtain additional Waybill data through discovery, so that the Board can ensure that this data is properly protected.

2. Access to Waybill Data Under 49 CFR 1244.9.

To effectuate both the automatic disclosure of confidential Waybill data and the potential release of additional Waybill data, the Board will propose amending its existing Waybill access procedures. See below. The procedures, which are set forth at 49 CFR 1244.9, describe five categories of users that can request access to Waybill data and the procedures for each category of user to do so. While there is a category of user for "transportation practitioners, consulting firms, and law firms" to obtain access to Waybill data, they may only use this data "in preparing verified statements to be submitted in formal proceedings before the STB." 49 CFR 1244.9(b)(4). The other available procedures similarly do not permit shippers to obtain such data for use in an arbitration.[47] Accordingly, the Board will propose modifying the language of § 1244.9(b)(4) to include parties to a small rate case arbitration as a category of user that may request and use such data in arbitrations under the proposed program.

3. Other Issues Related to Waybill Data Disclosure.

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[47] Under 49 CFR 1244.9(b)(1), a railroad may obtain access to Waybill data for any traffic in which the carrier participated. Under 49 CFR 1244.9(c), "other users" may request access to the Waybill Sample, but that process requires the filing of a written request, publication of notice of the request in the Federal Register, an opportunity for the carriers' whose data is being sought to file protests, a determination by the OE Director, and a right of parties to appeal the Director's decision. Even if such a request were processed on an expedited basis, it could take some months to reach a final resolution.

Petitioners propose that the Joint Notice be submitted to the Director of OE to facilitate timely preparation of the Waybill data. (Pet. 13; id., App. A at 6.) The Board will propose that the Joint Notice be submitted to the Director, along with a letter containing the five-digit STCC information necessary for OE to produce the confidential Waybill Sample data subject to automatic disclosure, and that OE would provide this data within seven days.

Petitioners also propose that the parties to the arbitration would enter into a Confidentiality Agreement covering the arbitration generally, including access to the Waybill Sample. (Pet., App. A at 8.)[48] However, the release of confidential data from the Waybill Sample requires an agreement with the Board. See 49 CFR 1244.9(b)(4)(v). Accordingly, the Board will propose that, as in formal proceedings and other waybill releases, OE provide to the parties a confidentiality agreement pursuant to 49 CFR 1244.9(b)(4)(v) that must be executed prior to release of any confidential Waybill data. Additionally, the Board will propose a requirement that the arbitrators sign their own agreement with the Board that would allow them to review confidential Waybill data that may be provided by the parties.

D. Admissible Evidence.

As discussed below (see infra Section VII.B), the Board will propose that evidence pertaining to product and geographic competition would be inadmissible, consistent with Board precedent regarding market dominance determinations. Mkt. Dominance Determinations—Prod. & Geographic Competition, 3 S.T.B. 937, 948 (1998) remanded sub nom. Ass'n of Am. R.Rs. v. STB, 237 F.3d 676 (D.C. Cir. 2001), pet. for review denied sub nom. Ass'n of Am. R.Rs. v. STB, 306 F.3d 1108 (D.C. Cir. 2002). As

[48] The proposed Confidentiality Agreement provided by Petitioners appears to be modeled on a frequently used protective order issued by the Board in adjudication and rulemaking proceedings in which information is filed under seal. (See Pet., App. B.)

noted below, (see infra Section XII), the Board will also propose that arbitration decisions be deemed non-precedential, and likewise inadmissible.[49] The Board will not, however, propose that evidence of revenue adequacy be inadmissible. As explained in detail below, (see infra Section VIII.A.2), the Board finds that section 11708 requires that shippers be allowed to submit, and arbitrators to consider, certain revenue adequacy evidence.

VII. Market Dominance.

A. Determination by the Arbitration Panel.

The Petition proposes that, under the proposed program, the arbitration panel would determine whether the railroad has market dominance. Petitioners contend that a "significant drawback" of the existing arbitration requirements is that they require the Board to determine market dominance prior to the arbitrator considering rate reasonableness. (See Pet. 21-22.) They argue that, with respect to small rate cases, "having to put rate reasonableness on hold while the Board decides market dominance could cause a significant delay and creates a disincentive for shippers to arbitrate." (Id.)

Section 11708 provides that, "with respect to rate disputes, [the Board] may make the voluntary and binding arbitration process available only to the relevant parties if the rail carrier has market dominance (as determined under section 10707)." 49 U.S.C. 11708(c)(1)(C). Section 10707 provides that where a shipper challenges a rail transportation rate subject to the Board's jurisdiction as being unreasonably high, "the Board shall determine whether the rail carrier proposing the rate has market dominance over the transportation to which the rate applies." 49 U.S.C. 10707(b).

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[49] Petitioners include proposed regulatory language stating that non-precedential decisions include "non-precedential decisions of the Board or of prior arbitrations." (Pet., App. A at 8 (proposed § 1108.27(e)(2)(ii)).) It is unclear to what "non-precedential decisions of the Board" is referring and the Board's proposal does not include this language.

Petitioners argue that the Board is not prohibited from permitting the arbitration panel to determine market dominance in the small rate case arbitration program. Petitioners argue that while section 11708 instructs the Board to make arbitration available only where the railroad has market dominance, it does not prohibit the Board from delegating the market dominance decision to the arbitration panel, provided the parties have voluntarily consented to that arrangement. (Pet. 22.) Petitioners also contend that, even if section 11708 forbids such delegation, the Board may use its exemption authority under 49 U.S.C. 10502(a) to exempt small rate case arbitrations from that provision, on the ground that any such requirement is not necessary to carry out the rail transportation policy or protect shippers from an abuse of market power. (Id.)[50]

Olin objects to this aspect of the Petition, arguing, among other things, that the Board should not "create a whole new alternative arbitration rate relief program in conflict with, but separate from the rate arbitration rules established by the Board under § 11708." (Olin Reply 10.) It notes that this is another reason why the proposed program should not supplant FORR, which avoids this problem by having the Board determine market dominance. (Id.)

The Board is skeptical of Petitioners' argument that, to the extent 49 U.S.C. 11708 prohibits the arbitration panel from determining market dominance in a rate arbitration, the Board could simply exempt parties from that provision pursuant to 49 U.S.C. 10502(a). Section 10502(a) authorizes the Board to exempt "person[s], class[es] of persons, or a transaction or service" from the provisions of U.S. Code title 49, subtitle IV, part A, under certain circumstances. From a practical standpoint, Petitioners

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[50] Petitioners also contend that the Board is not constrained by section 11708 and may propose arbitration procedures that deviate from that statute under its general rulemaking authority at 49 U.S.C. 1321(a), (Pet. 22), but as noted earlier, the Board is proposing a small rate case arbitration program in this decision pursuant to the requirements of section 11708.

appear to suggest that the Board may eliminate altogether a jurisdictional requirement for rate cases that Congress carried over to the arbitration context. Regardless, the Board need not reach that argument, as it now concludes that section 11708 does not prohibit an arbitration panel from determining market dominance.

1. Arbitrators Can Determine Market Dominance.

As noted above, under 49 U.S.C. 11708(c)(1)(C), "with respect to rate disputes, [the Board] may make the voluntary and binding arbitration process available only to the relevant parties if the rail carrier has market dominance (as determined under section 10707)." In Revisions Final Rule, the Board adopted a final rule allowing parties to obtain the requisite market dominance determination by either requesting a ruling from the Board solely on the issue of market dominance or conceding market dominance and thereby "forgoing the need for a determination by the Board." Revisions Final Rule, EP 730, slip op. at 6-7; see also Revisions to Arbitration Procs., 81 FR 30229 (May 16, 2016), EP 730, slip op. at 2-3 (STB served May 12, 2016). While the Board's decisions in that proceeding did not undertake a detailed analysis of whether section 11708 permitted an arbitrator or arbitration panel to determine market dominance, the Board did state that "the Board must determine if the rail carrier has market dominance before making the arbitration process available." Revisions to Arbitration Procs., EP 730, slip op. at 6; see also id. at 3 (noting that, "as required by the statute," arbitration may be "available only after [the Board] determines that a rail carrier has market dominance").

Here, the Board revisits this determination and now concludes that allowing arbitrators to determine market dominance is consistent with and permitted by the statutory language.[51] Although section 11708(c)(1)(c) requires that market dominance be

[51] It is an axiom of administrative law that an agency's adoption of a particular statutory interpretation at one point in time does not preclude later different interpretations. See, e.g., Hinson v. NTSB, 57 F.3d 1144, 1149-50 (D.C. Cir. 1995). If an agency changes course, it must provide "a reasoned analysis indicating that prior

determined under section 10707, and although section 10707 states that "the Board shall determine whether the rail carrier . . . has market dominance over the transportation to which the rate applies," the overarching purpose of section 10707 is to *define market dominance* and set forth *methodological* requirements for its determination—e.g., a finding of R/VC greater than 180%, directions for determining variable costs, and the prohibition against certain presumptions. It seems likely that section 10707 refers to "the Board" determining market dominance merely because the section otherwise governs determinations made in rate reasonableness proceedings before the Board. See 49 U.S.C. 10707(c) ("When the Board finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, *it* may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation.") (emphasis added)). It is reasonable, therefore, to conclude that the reference in section 11708(c)(1)(C)—a provision pertaining to rate reasonableness proceedings before an arbitrator, not the Board—to section 10707 is to the definitional and substantive, methodological requirements set forth in that section, not to any requirement that the Board itself determine the presence of market dominance.[52]

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policies and standards are being deliberately changed and not casually ignored," Grace Petroleum Corp. v. FERC, 815 F.2d 589, 591 (10th Cir. 1987) (citing Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)), and its new interpretation must be permissible under the governing statute, see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 865 (1984).

[52] In Revisions Final Rule, EP 730, slip op. at 2-3, the Board allowed parties to concede market dominance in rate disputes arbitrated under section 11708, acknowledging that the arbitration process is voluntary and that market dominance determinations may significantly delay the process. But, if the reference within section 11708(c)(1)(C) to section 10707 requires that "the Board" determine market dominance as a prerequisite to arbitrating a "rate dispute," that would seem to preclude ***any*** resolution of the market dominance issue other than by "the Board," including by stipulation. It could be argued that it would also constrain parties from "independently seeking or utilizing private arbitration services" to resolve a market dominance dispute, which would conflict with section 11708(b)(3). Accordingly, the better reading of the

The Board's modified interpretation that section 11708(c)(1)(C) permits the arbitration panel to determine market dominance in regard to arbitrated rate disputes also comports with the statute's objective of providing a voluntary arbitration process and advances Congress's stated goal when passing section 11708 of "increas[ing] the efficiency of dispute resolution" by "expand[ing] existing work at the STB to encourage and provide arbitration for dispute resolution." S. Rep. No. 114-52, at 7, 13 (2015). Nothing within section 11708's legislative history otherwise indicates that Congress expected that the Board itself would resolve market dominance before allowing the arbitration of rate disputes. The Board also recognizes, as it has in the past, that the arbitrators' inability to rule on market dominance is likely one hindrance to parties' willingness to use the arbitration process. See Revisions Final Rule, EP 730, slip op. at 6 (acknowledging that market dominance determinations being made by the Board "may significantly delay the arbitration process"). These circumstances, and section 11708's objective of encouraging the use of arbitration to resolve disputes, support interpreting section 11708 to permit the arbitration panel to determine market dominance in rate disputes. See, e.g., Rux v. Republic of Sudan, 461 F.3d 461, 470 (4th Cir. 2006) (expressing the need to "interpret statutory language in a manner that effectuates congressional intent"); Teva Pharms., USA, Inc. v. FDA, 182 F.3d 1003 (D.C. Cir. 1999) (same).[53]

2. Market Dominance Does Not Have to be Determined before the Arbitration Process Begins.

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statute is that it permits parties to (1) agree to concede market dominance, (2) agree to its determination by an arbitrator within an arbitration (be it one under the auspices of section 11708 or otherwise), or (3) have that issue first be determined by the Board.

[53] In addition, parties have the right to appeal arbitration decisions to the Board under 49 U.S.C. 11708(f), which would include the arbitration panel's market dominance finding.

To the extent the Board's prior rulemaking can be read to suggest that section 10708(c)(1)(C) requires that *any aspect* of the "arbitration process" be made available to resolve a "rate dispute" only after it has been determined that a carrier has market dominance—either by the Board, an arbitrator, or by stipulation—it bears emphasizing that arbitration under the rule proposed here would function no differently than the Board's decision-making in a formal rate case. If the arbitrators conclude that there is no market dominance, that would end the arbitration; like the Board, the arbitrators would not proceed to rule on the merits of rate reasonableness. The Board concludes that section 11708(c)(1)(C) does not require market dominance and rate reasonableness issues to be litigated or arbitrated sequentially, only that a finding of market dominance must be made before the arbitration panel may determine rate reasonableness. A contrary reading of the statute would suffer from the same drawbacks discussed above and could contravene the stated goal in adopting the arbitration provision in the first place. See S. Rep. No. 114-52 at 7 (stating that the STB Reauthorization Act would expand existing work at the STB to encourage and provide arbitration for dispute resolution). By encouraging parties to resolve rate disputes through arbitration in lieu of adjudication but still requiring those parties to adjudicate market dominance before the Board or in a separate arbitration as a mandatory prerequisite, it could undermine the effectiveness of arbitration as an alternative to formal litigation.

Given its modified interpretation of section 11708, the Board will propose that market dominance determinations be made by the arbitration panel under the proposed program.[54] As with the procedures under the Board's current arbitration program, see Revisions Final Rule, EP 730, slip op. at 6-7, the carrier may concede market dominance,

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[54] The Board will determine whether an amendment to the market dominance determination in the existing arbitration procedures under 49 CFR part 1108 should be made after the conclusion of this rulemaking.

or the parties may jointly request that the Board determine market dominance. See proposed § 1108.29(b)(1)(vi).

B. Other Market Dominance Issues.

Petitioners propose that the arbitration panel be required to follow the streamlined market dominance approach that the Board adopted in EP 756. (See Pet. 13); see also Mkt. Dominance Streamlined Approach, EP 756 (STB served Aug. 3, 2020).[55] However, in their supplemental filing, they indicate that they no longer object to allowing shippers to use the proposed arbitration process if they proceed under a non-streamlined analysis. (Pet'rs Suppl. 5-6.) Petitioners also propose that when deciding market dominance, the arbitration panel not consider evidence of product and geographic competition, nor apply the limit price test as described in M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 11-18 (STB served Sept. 27, 2012). (See id. at 13-14, 27.) They contend that the limit price test involves detailed policy and legal challenges not appropriate for litigation in a streamlined and expedited arbitration with limited appellate rights. (Id. at 27.)

The Board will propose that the complainant in a small rate case arbitration under these procedures may attempt to establish market dominance using either the streamlined or non-streamlined approach.[56] Both the shipper interests and Petitioners appear to agree that there should be no restriction on which market dominance approach a shipper

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[55] Because Petitioners submitted the Petition prior to the Board's adoption of the final rule in EP 756, they stated they reserved the right to revise this proposal in the event the Board adopted a final rule in EP 756 that deviated materially from the Board's original, proposed rule. (See Pet. 13 n.47.)

[56] Because both the streamlined market dominance approach and non-streamlined approach comply with the requirements of 49 U.S.C. 10707, use of either approach is permissible under section 11708. The Joint Shippers also argue if the Board were to adopt the "á la carte" approach to determining market dominance they proposed in Mkt. Dominance Streamlined Approach, Docket No. EP 756, it would mitigate the time and expense of arbitrating market dominance. (Joint Shippers Suppl. 13.) The á la carte approach is the subject of the Joint Shippers' petition for reconsideration in that proceeding and will therefore not be addressed here.

decides to utilize under the proposed program. The Board will also propose prohibiting arbitrators from considering evidence on product and geographic competition and the limit price test as part of the market dominance analysis. The Board does not consider product or geographic competition under either the streamlined or non-streamlined market dominance approach. See Mkt. Dominance Streamlined Approach, EP 756, slip op. at 31-32 (STB served Aug. 3, 2020); Product & Geographic Competition, 5 S.T.B. 492, 499 (2001), corrected, EP 627, (STB served Apr. 6, 2001), aff'd sub nom. Ass'n of Am. R.Rs. v. STB, 306 F.3d 1108 (D.C. Cir. 2002). Olin states that the limit price test is established precedent, and notes that the FORR proposal does not prohibit its use. (Olin Reply 10-11.) However, the limit price test has been the subject of controversy in rate cases and thus would only add time and complexity to small rate case arbitrations. Accordingly, the Board will propose that the arbitration panel cannot consider the Limit Price Test as part of its market dominance determination. See proposed § 1108.29(b)(1)(v).

VIII. Arbitration Decision

A. Rate Reasonableness Standard of Review.

Petitioners propose that, when determining rate reasonableness, the arbitration panel follow the standards prescribed in 49 U.S.C. 11708(c)(3) and (d)(1). However, Petitioners also propose prohibiting the arbitration panel from "considering any type of system-wide adequacy constraint, including the revenue adequacy constraint described in Coal Rate Guidelines, 1 I.C.C.2d 520, 535 (1985)," and relatedly that "any evidence related to the revenue adequacy of the defendant carrier" be inadmissible. (Pet. 14-15; id., App. A at 8.) Shippers generally support use of the standards proposed by Petitioners, though some urge the Board to include more specificity regarding the ability of arbitrators to apply market-based factors. Shippers strongly oppose any restrictions on

revenue adequacy considerations in arbitrations under the proposed small rate case program.

1. General Standard.

Under the statutory provisions of section 11708(c)(3) and (d)(1), when deciding whether a rate is reasonable, an arbitration panel must: (i) consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues; and (ii) ensure that its decision is consistent with sound principles of rail regulation economics.

NGFA suggests that the Board add language stating that arbitrators can consider "flexible market-based standards," including ones that are incorporated in the NGFA's own private agreement to arbitrate with BNSF. (NGFA Reply 12.) NGFA states that such additional flexible market-based factors would include: (1) rate levels on comparative traffic, (2) market factors for similar movements of the same commodity, and (3) overall costs of providing the rail service. (Id.) The Joint Shippers state that the Board should adopt the market-based factors proposed by NGFA, as providing arbitrators with such a list of would help arbitrators identify factors with a sound economic basis, which could increase the quality of panel decisions. (Joint Shippers Suppl. 13-14.) In their supplemental filing, Petitioners state that they have no objection to the Board explicitly permitting the arbitration panel to consider these market-based factors. (Pet'rs Suppl. 4.)

The Board will propose the same general standards for rate reasonableness as suggested in the Petition, which closely follows the language of section 11708(c)(3) and (d)(1). The Board agrees with Petitioners that while section 11708(c)(3) requires that the arbitration panel "consider" the Board's existing methodologies, the statute does not require that the arbitration panel follow any particular methodology. As Petitioners note, this interpretation permits the arbitration panel flexibility by not requiring it "to conform

precisely to existing methodologies, but rather permits the panel to base its decision on alternative approaches so long as they are consistent with sound railroad economics." (Pet. 25.) This interpretation also is broadly similar to one of the key features of FORR, which would also allow parties flexibility to choose how to present and support their offers, including the methodology used. See FORR SNPRM, EP 755, slip op. at 26-27 (STB served Nov. 15, 2021). Similar to the FORR proposal, here parties in arbitration would also be able to "use their preferred methodologies, including revised versions of the Board's existing rate review methodologies or new methodologies altogether." Id. at 11. Moreover, because arbitration decisions broadly are to be "consistent with sound principles of rail regulation economics," and are not to "directly contravene[] statutory authority," the Board expects the arbitration panel to be informed by the rail transportation policy at 49 U.S.C. 10101, to consider the Long-Cannon factors at 49 U.S.C. 10701(d)(2), and to use appropriate economic principles, as would the Board in a decision in a FORR proceeding. Compare 49 U.S.C. 11708(d)(1), (h) with FORR SNPRM, EP 755, slip op. at 27-28 (STB served Nov. 15, 2021). Also as was the stated intention in FORR, the arbitration program's use of principle-based, non-prescriptive review criteria should facilitate methodological innovation—albeit without the precedential effect anticipated in FORR—with overall complexity constrained by an abbreviated procedural schedule and a streamlined discovery process.

Given the methodological flexibility described above, and because all parties appear to agree to include NGFA's proposed market-based factors in the text of the regulation, the Board will include them as part of its proposal. See proposed § 1108.29(b)(2). Furthermore, parties arbitrating pursuant to 49 U.S.C. 11708 are free to present new or modified rate reasonableness methodologies that consider additional market-based factors.

2. Revenue Adequacy.

Petitioners also propose prohibiting the arbitration panel from considering any type of system-wide revenue adequacy constraint, including the revenue adequacy constraint described in Coal Rate Guidelines. (Pet. 14-15; id., App. A at 8.) They also propose that any evidence related to the revenue adequacy of the carrier be deemed inadmissible. (Id. at 15; id., App. A at 8.) Petitioners contend that over the past decade, they have raised "serious legal, factual, and policy flaws with any constraint premised on the system-wide financial health of a carrier," which they characterize as an "antiquated, utility-style concept of rate regulation that has long since been abandoned in other industries." (Id. at 14-15.) They state that they will not consent to a such a constraint applying in a small rate case arbitration, especially given the short deadlines and limited appeal rights. (Id. at 15.)

Several shippers object to prohibiting the arbitration panel from considering the revenue adequacy constraint in reaching an arbitration decision. The Joint Shippers note that in Hearing on Revenue Adequacy, Docket No. EP 761, and Final Offer Rate Review, Docket No. EP 755, the ACC has submitted the prototype for a rate dispute methodology that implements the revenue adequacy constraint and that the carriers' proposed revenue adequacy constraint prohibition, combined with the proposed FORR exemption for participating carriers, would foreclose small rate case shippers from using this proposed methodology. (Joint Shipper Reply 5.) In their supplemental filing, the Joint Shippers argue that the revenue-adequacy constraint is especially relevant today because many railroads are reaching long-term revenue adequacy. (Joint Shipper Suppl. 4.) They further argue that Petitioners' assertion that the revenue adequacy constraint is highly contested and that the limited appellate standards governing arbitration decisions does not justify the prohibition. The Joint Shippers also argue that such a prohibition conflicts with Congress's directive in 49 U.S.C. 11708(c)(3) that arbitrators consider revenue

adequacy, specifically, that arbitrators "giv[e] due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues." (Id. at 7.)

Olin agrees with the Joint Shippers that the program as proposed by Petitioners would effectively insulate railroads from the revenue adequacy constraint, which it argues the Board has recognized as "an essential first constraint in limiting the extent to which railroads can price their services," and which is established precedent. (Olin Reply 7-8; see also Joint Shippers Suppl. 4 (noting that the revenue adequacy constraint has long been established as a proper rate reasonableness standard by the Board).) Olin further notes that, by contrast, there is no such limit on revenue adequacy evidence under the proposed FORR process. (Olin Reply 11-12; see also U.S. Wheat Suppl. 7.) USDA argues that, if Petitioners insist on limiting arbitrators from considering evidence on revenue adequacy, then shippers should have the option to use FORR or arbitration. (USDA Reply 2.)[57]

In their supplemental filing, Petitioners reiterate their position that controversial issues like revenue adequacy should not be litigated for the first time in small case arbitrations with limited appellate rights. (Pet'rs Suppl. 2.) They emphasize that use of "any regulatory adequacy constraint" in rate reasonableness determinations, including ACC's proposed benchmark method, represents a "grave regulatory misstep." (Id. at 15.) They further state that, even if revenue adequacy were a lawful method of constraining rates (which they claim it is not), the application of the concept is currently undefined, and allowing arbitrators to define it "risks departure from sound principles of rail

[57] NGFA states that it takes no position on the proposed exclusion of revenue adequacy considerations though, as discussed above, it argues that if the Board adopts the Rate Increase Constraint, carriers that participate in the proposed small rate case arbitration program should not be permitted to withdraw from the program on that basis alone. (NGFA Reply 10-11, 13.) NGFA further argues that, if adopted, the Rate Increase Constraint should be available for consideration in arbitrations under the proposed small rate case program. (Id. at 11.)

transportation economics." (Id.) As such, they reiterate that they will not agree to arbitrate rate disputes where shippers are permitted to use a revenue adequacy constraint. (Id.)

The Board finds that Petitioners have not sufficiently justified their proposed methodological and evidentiary restrictions pertaining to revenue adequacy, and they will not be included as part of the Board's proposal. Regarding the evidentiary restriction, the regulatory text proposed by Petitioners prohibiting "any evidence relat[ing]" to "the revenue adequacy of the defendant carrier," (see Pet., App. A at 8 (proposed § 1108.27(e)(2)(iii)), conflicts with section 11708(c)(3)'s requirement that arbitrators give "due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2))." It is unclear how the arbitrators could comply with their statutory obligations if absolutely prohibited from considering any evidence concerning revenue adequacy.

Petitioners' proposal that arbitrators be prohibited "from considering any type of system-wide revenue adequacy-based constraint" raises similar concerns.[58] For example, the Three-Benchmark methodology uses the Revenue Shortfall Allocation Method (RSAM) benchmark to "account[] for a railroad's need to earn adequate revenues, as required by 49 U.S.C. 10704(a)(2)." Rate Guidelines—Non-Coal Procs., 1 S.T.B. 1004, 1027 (1996). Indeed, where the revenue a carrier collects from its captive traffic (i.e., the $R/VC_{>180}$ benchmark) exceeds RSAM, use of the Three-Benchmark methodology may operate to constrain a carrier's rates based on its revenue requirements. See id. at 1043

[58] Petitioners phrase this restriction more narrowly than their proposed evidentiary restriction, which would more broadly prohibit "any evidence relat[ing] to the revenue adequacy of the defendant carrier." (Pet., App. A at 8 (proposed § 1108.27(e)(2)(i).) However, when the two provisions are considered together, Petitioners appear to intend the restriction on "any system-wide revenue adequacy constraint" as a broad exclusion of any methodology involving revenue adequacy, as evidenced by their objection to the use of ACC's proposed benchmark method.

("The greater the difference between the two benchmarks [where RSAM is lower than $R/VC_{>180}$ benchmark], the greater the downward adjustment to the carrier's average rates on its >180 traffic that would still permit it to meet the RSAM revenue need standard.") Under the regulatory language proposed by Petitioners, the use of RSAM—and hence the entire Three-Benchmark methodology—could arguably be considered outside the bounds of the arbitrators' consideration. Yet Petitioners appear to have no objection to arbitrators relying on the Three-Benchmark methodology for determining the reasonableness of the rate. By contrast, Petitioners object to the arbitrators considering ACC's proposed benchmark method despite it bearing certain similarities to the Three-Benchmark methodology.[59]

Additionally, it is possible that the market-based factors proposed by NGFA—which Petitioners agree arbitrators may consider—could require the consideration of the carrier's capital requirements, which in turn would also run afoul of Petitioners' proposed revenue adequacy prohibitions. Generally speaking, it is difficult to reconcile the methodological flexibility afforded to arbitrators by section 11708 (as attested to by Petitioners, see supra Section VIII.A.1) and section 11708's requirement that arbitrators consider the need for differential pricing to attain revenue adequacy with the seemingly expansive limitation on the use of "any system-wide revenue adequacy constraint" as proposed by Petitioners.

Accordingly, the Board's proposed regulations do not include a general prohibition on revenue adequacy evidence or methodologies. In addition, the Board will propose adding the phrase "as determined under section 10704(a)(2)" to Petitioners'

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[59] As ACC has described it, the benchmark method relies upon a model to predict competitive benchmark rates for captive rail movements using certain competitive rail movements, which are then—through application of a "multiplier"—adjusted to "determine the appropriate degree of differential pricing consistent with the Board's rail revenue adequacy standard." Joint Shippers Comment 20, Nov. 12, 2019, Final Offer Rate Rev., EP 755.

suggested provision mandating that the arbitration panel consider the need for differential pricing to permit a rail carrier to collect adequate revenues.[60] Petitioners' provision is based on language taken directly from section 11708 but omits this phrase. Compare Pet., App. A at 9 with 49 U.S.C. 11708(c)(3). The reference to section 10704(a)(2) is specifically stated in the statute and therefore should not be excluded from the regulatory text.

B. Arbitration Decision Timeline.

Petitioners propose that the arbitration panel issue its decision within 120 days, but again, propose varying starting points; they propose in the body of the Petition that this period would start on the date that the Joint Notice is filed, but propose in the appendix that it would start from the commencement of arbitration (i.e., two business days after the arbitration panel is appointed).

The Board will propose that the arbitration panel issue its decision no later than 30 days after close of the evidentiary phase, rather than within 120 days from either the submission of the Joint Notice or commencement of arbitration. See proposed § 1108.27(c)(3). This accounts for the potential extension or shortening of the evidentiary phase deadline and comports with section 11708(e)(3), which requires that the arbitration panel shall issue a decision not later than 30 days after the date on which the evidentiary record is closed.

IX. Relief.

Petitioners propose that any relief awarded in a single arbitration be capped at $4 million (indexed for inflation annually using the Consumer Price Index and a 2020 base year) over two years. (Pet. 11.) This monetary cap would apply to prospective relief, retroactive relief, or a combination of the two. (Id.) They further propose that any

[60] See proposed § 1108.29(b)(2).

prospective relief in the form of rate prescriptions be limited to one year. (Id.) Petitioners state that a $4 million relief cap would capture the majority of potential rate litigants and that relief under the proposed program would be higher, on an annualized basis, than what was originally proposed in Simplified Standards, Docket No. EP 646 (Sub-No. 1). (Pet. 27 n.56.)

NGFA states that it agrees with the $4 million/two-year relief cap, but it stipulates that the cap should be reconsidered if the Board adopts a higher cap in FORR. (NGFA Reply 8-9.) Olin argues that the proposed one-year limit on rate prescriptions cuts in half the two-year limit on rate prescriptions proposed under FORR. (Olin Reply 11.) The Joint Shippers note this in their supplemental filing as well, pointing out that Petitioners fail to explain why prescriptive relief should be limited to one year. (Joint Shippers Suppl. 9.) While the Joint Shippers further note that complainants are entitled to four years of relief in any combination of reparations and prescription in a Three-Benchmark proceeding, they state that they do not oppose a general two-year relief period. (Id.)

A. Prescription Amount and Length.

The Board will propose a relief cap of $4 million and a relief period of two years. An award of $4 million, covering a period of two years (applied to a combination of retroactive and prospective relief), should be of sufficient value to incentivize shippers to use the proposed program while also addressing the carriers' concern that the proposed program remains limited to only smaller rate disputes. The $4 million cap also parallels the relief that is proposed in the FORR process.[61]

[61] U.S. Wheat argues that the arbitration proposal appears to be a strategic move to stop any increase in the recovery cap in FORR. (U.S. Wheat Suppl. 7.) If the Board proceeds with FORR and considers raising the relief cap there, it can also address whether to make a corresponding change to the relief cap for the proposed small rate case arbitration program at that time.

The Board will not, however, propose a one-year cap on prescriptions. Here, Petitioners propose that the total relief period—which could include either reparations for past movements or a prescription for future movements, or both—should be two years. However, they also propose (without explanation) that any prescription be limited to a single year. The Joint Shippers correctly point out that this could unfairly limit a shipper's relief.[62] Thus, under the Board's proposal, the length of the prescription could be as long as the total period for relief, which here would be two years. See proposed § 1108.28(b). As the Joint Shippers note, this would be consistent with the Board's treatment of relief periods in other contexts. See Rate Regulation Reforms, 78 FR 44459 (July 24, 2013), EP 715, slip op. at 22-25.

B. Preclusive Effect of Arbitration Decision.

Petitioners' proposed regulations would preclude shippers from bringing a rate complaint or other proceeding for the same traffic for the later of (a) two years from the filing of the joint notice to arbitrate or (b) expiration of any rate prescription imposed. (Pet., App. A at 9.) The Board notes that Petitioners' proposal does not seem to account for a situation in which the carrier increases the rate at issue after the arbitration decision. Specifically, if a shipper is unsuccessful in arbitration, Petitioners' proposal would preclude the shipper from challenging the rate for two years, even if the carrier were to raise the rate immediately after the panel rendered its decision. Under Board and court precedent, shippers that have lost a formal rate case may not challenge the same rate for the same traffic, but they may challenge a *new* rate for the same traffic. See Mkt. Dominance Streamlined Approach, EP 756, slip op. at 44 (citing Burlington N. & Santa

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[62] For example, if a shipper initiates arbitration immediately after a rate takes effect, the arbitration process lasts six months (consistent with the timelines proposed here), and the shipper is successful, it would receive six months of reparations for the period in which the arbitration was conducted. However, if there was a one-year prescription cap, the shipper would be artificially limited to 18 months of total relief even if it had successfully demonstrated that two years of relief was warranted.

Fe Ry. v. STB, 403 F.3d 771, 778 (D.C. Cir. 2005); Intermountain Power Agency v. Union Pac. R.R., NOR 42127, slip op. 4 (STB served Nov. 2, 2012)).

A similar situation would occur if the shipper is awarded a prescription shorter than two years. For example, if a shipper is awarded a six-month prescription, under Petitioners' proposal, the shipper would be barred from challenging the rate for the 18 months following expiration of the prescription even if the railroad increases the rate during those 18 months. This is again inconsistent with how the Board treats the effect of a rate decision in other contexts. With regard to Three-Benchmark proceedings, the Board has held that "[i]f . . . a carrier establishes a new common carrier rate once the rate prescription expires, and the new rate exceeds the inflation-adjusted challenged rate, the shipper may bring a new complaint against the newly established common carrier rate." Rate Regulation Reforms, EP 715, slip op. at 12.

Accordingly, the Board will propose language that makes clear that the preclusive effect of an arbitration decision is terminated if the carrier increases the rate. See proposed § 1108.29(d)(3). Specifically, the proposed language would allow a shipper that has either lost an arbitration or prevailed in arbitration but exhausted its prescription to bring a new arbitration for the same traffic if the carrier increases the rate. This modification would ensure fairness and comport with precedent in other contexts, as noted above.

C. Agreements to Modify Relief Cap.

The Board will propose permitting carriers and shippers to agree in an individual case to arbitrate under the proposed procedures for a lesser or higher amount and/or a shorter or longer relief period, not to exceed the $25 million cap or five-year period set forth in 49 U.S.C. 11708. See proposed § 1108.28(c). As noted above, the Board will propose that any such agreement be noted in the confidential summary that is filed at the conclusion of the arbitration. See proposed § 1108.29(e)(1).

X. Appeals and Enforcement

Petitioners propose that the Board include appellate procedures and standards. An appeal would be initiated by the appellant filing a notice, which would allow the Board to formally docket the proceeding. (Pet., App. A at 10.) Petitioners include a proposed notice of appeal form. (Pet., App. C.) This notice would provide only basic information about the appeal, including the date of the arbitration decision and the name of the appealing party; the opposing side would not be named. (Id.) The subsequent appellate procedures proposed by Petitioners would closely follow those of 49 CFR 1108.11. (Pet., App. A at 10.)

Petitioners further propose that the Board's standard of review for arbitration decisions would be limited to the same criteria as those governing the existing arbitration process in 49 CFR 1108.11(b). (Pet. 15.)[63] Petitioners propose that the Board's decision would be public, but that the Board should "maintain the confidentiality of the arbitration decision to the maximum extent possible" by redacting certain information. (Pet., App. A at 11 (proposed § 1108.31(d).)

Lastly, Petitioners propose that the Board's decision on appeal would be judicially reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342; stays of arbitration decisions would not be automatic, though could be sought pursuant to 49 CFR 1115.3(f); and enforcement of an arbitration decision would have to be sought in a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. 9-13. (Pet. 15.)

The Board will propose appellate and enforcement procedures similar to those proposed by Petitioners. Olin argues that the ability of parties to appeal to either the Board or a court serves as a "roadblock[] to relief with an extra layer of appeals than that

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[63] Specifically, the Board would only review whether: (a) the decision is consistent with sound principles of rail regulation economics; (b) a clear abuse of arbitral authority or discretion occurred; (c) the decision directly contravenes statutory authority; or (d) the arbitral award limit was violated. 49 U.S.C. 11708(h).

provided under FORR." (Olin Reply 11; see also U.S. Wheat Suppl. 6 (arguing that a railroad will probably always appeal if they lose a case).) However, section 11708(h) sets forth a party's right to appeal an arbitration decision to the Board, and the Board does not determine the federal courts' jurisdiction to review or enforce the Board's decisions. Moreover, the bases for appeal to the Board and the courts are both narrow, a fact which, when coupled with the many other benefits that small rate case arbitration could provide, outweighs this concern.

The Board will propose some modifications to the carriers' proposed confidentiality provisions relating to appeals of the arbitration decision, which are discussed in detail in the following section.[64] In addition, the Board will propose adding a provision stating that parties may seek judicial review of arbitration awards in a court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. 9–13, in lieu of seeking Board review. See proposed § 1108.31(f).[65] This provision already exists for the current arbitration process. See 49 CFR 1108.11(b)(1). The Federal Arbitration Act allows parties the right to seek: (i) an order confirming an arbitration award, or (ii) direct judicial review of an arbitration award for "egregious departures from the parties' agreed-upon arbitration." Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008). The

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[64] It appears that Petitioners propose that the appealing party file its notice of appeal as a means of providing public notice that the appeal had become an official proceeding before the Board, given that they also propose that all filings to the Board concerning the arbitration be kept confidential. As discussed in the following section, the Board proposes that a public version of those filings must be submitted. Accordingly, a notice of appeal would be unnecessary.

[65] Petitioners propose regulatory language stating that "A party to an arbitration proceeding under this part may appeal the arbitration decision only to the Board." (Pet., App. A at 10.) As explained above, the Board will not include this in its proposed regulations.

Board sees no reason to exclude arbitrations under the proposed program from the provisions of the Federal Arbitration Act.[66]

XI. Confidentiality

Petitioners characterize confidentiality as a "key requirement for future arbitrations." (Pet. 22.) They contend that if arbitration decisions are made public, they could influence the marketplace and drive up the stakes for railroads with similarly situated customers and shippers that often move traffic over more than one railroad. (Id. at 22-23.) They suggest that this would be unfair given the expedited timelines of the proposed program and the limited grounds for appellate review. (Id.) They further contend that a confidential process would focus the parties on the present dispute without the risk of setting precedent in other cases or affecting the market expectations of other entities in the supply chain. (Id.; see also Pet'rs Suppl. 8-9 ("[Petitioners] believe that confidentiality of arbitration decisions will help railroads and shippers focus on a swift and amicable solution to the rate dispute at hand, without having to worry about broader implications.")). Finally, they also contend that, under federal law, there is a presumption of privacy and confidentiality in arbitrations. (Id. (first citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010); and then citing Janvey v. Alguire, 847 F.3d 231, 248 (5th Cir. 2017)).)

As such, Petitioners propose that the "entirety of the arbitration process" be deemed confidential. (Pet. 16, 23; id., App. A at 6-8.) They propose that confidentiality would be effectuated through a Confidentiality Agreement, and they include a proposed version of the Confidentiality Agreement with the Petition. (Id. at 16; id., App. A at 8;

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[66] Additionally, some courts have held that these provisions of the Federal Arbitration Act cannot be waived. See In re Wal-Mart Wage & Hour Empl. Pracs. Litig. v. Class Couns. & Party to Arb., 737 F.3d 1262, 1267 (9th Cir. 2013) ("Just as the text of the [Federal Arbitration Act] compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract.").

id., App. B.) Petitioners further propose that the arbitration decision would not be submitted to the Board as a matter of course, which is required under the existing arbitration program (49 CFR 1108.9(e)), though a copy would be provided to the Board in the event of an appeal. (Pet. 23, App. A at 9.) Petitioners also propose that under no circumstances would the Board make publicly available a redacted version of the arbitration decision, as currently required under 49 CFR 1108.9(g). (Id., App. A at 9.)

Petitioners propose that, should there be an appeal, the notice of appeal would be formally docketed and made public, but that it would contain limited information. (Id. at 16; id., App. A at 10.) Petitioners include a proposed version of the notice of appeal form with the Petition. (Id., App. C.) Under Petitioners' proposal, parties would be required to file all appellate submissions—including the arbitration decision, the petition to vacate or modify the arbitration award, and any reply—under seal, and no public versions would be filed. (Id. at 16; id., App. A at 9-11.) They further propose that the Board's appellate decision would be public but would require the Board to maintain the confidentiality of the arbitration decision to the "maximum extent possible," with particular attention paid to "avoiding the disclosure of information that would have an effect or impact on the marketplace." (Id., App. A at 11.) In addition, they propose that in "no event" would the Board—in its decision "or otherwise"—disclose: "(i) the specific relief awarded by the arbitration panel, if any, or by the Board; or (ii) the Origin-Destination pair(s) involved in the arbitration." (Id.) They also propose a procedure by which parties would have the opportunity to request redactions of the Board's decision prior to its public release. (Id.)

To permit the Board to monitor the proposed small rate case arbitration program, Petitioners propose that the parties would submit a confidential summary to OPAGAC within 14 days after either receiving the arbitration decision, the dispute settles, or the dispute is withdrawn. (Id., App. A at 9-10.) The Petition includes a provision for the

Board to publish public quarterly reports on the final disposition of arbitrated rate disputes under the proposed program, using only the categories of information contained in the confidential summaries, and not disclosing the identity of the parties to the arbitration. (Id., App. A at 10.) Petitioners propose that the summaries and quarterly reports include only: (i) the geographic region of the movement(s) at issue; (ii) the commodities at issue; (iii) the number of days from the commencement of the arbitration proceeding to the final arbitration decision; and (iv) a high-level, generic description of the resolution (e.g., settled, withdrawn, dismissed on market dominance, or challenged rates found unreasonable/reasonable). (Pet. 16.)

The USDA and shipper interests object to the idea that arbitration decisions would be kept confidential. USDA states that Petitioners' rationale for keeping decisions confidential is "vague, unsupported by any data, and, therefore, highly speculative (at best)." (USDA Reply 2.) As noted above, it further states that "[t]he fact that transparency might 'drive up the stakes' because railroads 'may have similarly situated customers' (i.e., other customers with unreasonable rates) should be a reason for transparency, not a reason for secrecy." (Id. at 3.) NGFA also objects to keeping arbitration decisions confidential, which it notes is contrary to NGFA's own private arbitration program with BNSF and the regulations adopted by the Board in Assessment of Mediation & Arbitration Procedures, EP 699 (STB served May 13, 2013). (NGFA Reply 7-8); see also 49 CFR 1108.9(e), (g). NGFA states that, in its experience, the prospect of a public decision often incentivizes parties to settle. (NGFA Reply 8; see also Joint Shippers Suppl. 9.)[67] Olin argues that in prior arbitration rulemakings, railroad interests opposed the idea of confidential arbitration decisions. (Olin Reply 5.) It claims

[67] NGFA indicates, however, that it would support redacting confidential information from arbitration decisions, as provided in the Board's existing regulations. (Id.)

the fact that FORR decisions would not be confidential is another reason why that approach is preferable to arbitration. (Id. at 12; see also U.S. Wheat Suppl. 6.) In their supplemental filing, the Joint Shippers argue that, if arbitration decisions are kept confidential and railroads who participate in arbitration are exempt from FORR, meaningful oversight would be nearly impossible. (Joint Shippers Suppl. 8-9.)

Petitioners reiterate the need for confidentiality in their supplemental filing. They argue that, without confidentiality, they would not be willing to submit a complex rate reasonableness claim to an arbitration panel using an expedited process with limited discovery and appellate rights. (Pet'rs Suppl. 7.) They contend that confidentiality is not a one-sided benefit to the railroads, as it creates an environment in which railroads are willing to agree to arbitrate small rate disputes quickly and with increased flexibility—the very result shippers have been requesting, and the Board has been seeking, for years. (Id. at 8.) They argue that if arbitration decisions were public, parties "would be motivated to throw the proverbial kitchen sink into the arbitration" rather than tailor the scope of litigation to the amount immediately in controversy (even if the decisions were deemed non-precedential). (Id. at 10.)

In response to NGFA's assertion that making arbitrations public is in the public interest, Petitioners argue that the public interest is better served by having an effective arbitration program, which can only be accomplished through confidentiality. (Id.) Petitioners also argue that the value of confidentiality in arbitration is not disproven because some railroads expressed a different view in comments on an arbitration program that proved to be unsuccessful. (Id. at 9 n.9.) Lastly, they state that the fact that the arbitration process would be confidential does not implicate concerns about the integrity of the process, as there are other safeguards in the proposed program, most notably the arbitrator selection process and appellate process. (Id. at 10.)

A. Confidentiality in General.

Having considered the arguments, it appears that keeping arbitration decisions issued under the proposed program confidential would be more likely to serve as an incentive for carriers to participate in the program.[68] All else being equal, if a carrier has the option between litigating the merits of a rate case before the Board or arbitrating, with the decision in each being public, it is reasonable to find the carrier is more likely to choose litigation, where it has the benefit of more formal legal procedures. In addition, as Petitioners note, one of the key benefits of the arbitration process is its informal nature, which should make it more accessible to parties, particularly small shippers. However, the benefits of informality could be significantly undermined if the arbitration decisions were made public. Specifically, the importance of a public arbitration decision would be greatly elevated, as it could impact not just the dispute at issue, but a broad range of other rate negotiations and disputes. As such, each side would be much more likely to treat the arbitration like litigation, which could have the effect of raising costs to all parties. Further, even though arbitration decisions are non-precedential, confidentiality may further encourage settlement in some cases, as parties will not have to worry about the impact a settlement may have on other rate negotiations.

The Board acknowledges Olin's point that the Board adopted 49 CFR 1108.9(g), which requires the public posting of arbitration decisions under the existing program, at the urging of certain parties—including rail carriers—that there be greater transparency. See Assessment of Mediation & Arb. Procs., EP 699, slip op. at 15 (summarizing arguments by AAR and UP advocating that the publicity of arbitration awards would ensure transparency, discourage extreme positions, and incentivize well-reasoned arbitration decisions, among other things). The Board also understands the argument

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[68] Notably, section 11708 does not address confidentiality specifically, although the provision at section 11708(c)(1) authorizing the Board to make arbitration available through procedures adopted in a rulemaking plainly permits imposition of such a requirement.

from USDA and NGFA that the fact that an arbitration decision might impact other rate negotiations could be considered more of a reason to make arbitration decisions public. However, as with many other aspects of the proposed small rate case arbitration program, there are trade-offs to both approaches. Understanding that Petitioners have identified confidentiality as a "key element" of their proposal, and to encourage their participation, the Board will propose that the arbitration process here be kept confidential. Even though there were sound reasons for requiring greater transparency in Assessment of Mediation & Arbitration Procedures, Docket No. EP 699, the Board understands that a voluntary arbitration program can only be successful if carriers and shippers are willing to use it. The Board finds that the confidentiality trade-off here (designed to incentivize the railroads to participate) is balanced by other aspects of the Board's proposed program (designed to encourage shipper participation), such as affirming a standard that gives the arbitration panel flexibility in deciding what the rate should be and allowing arbitrators to consider revenue adequacy evidence.[69]

To allow the Board to monitor the proposed program, the Board will propose that parties file confidential summaries of each arbitration. The summaries should include the list of information proposed by Petitioners,[70] as well as whether the parties agreed to a different relief cap or period than set forth in the regulations. The Board will propose that the confidential summaries not be published, but that the agency would issue a public quarterly report providing information contained in the confidential summaries, which would not include the identity of the parties to the arbitration. It is unclear whether

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[69] As with market dominance determinations, see infra note 50, the Board will determine whether an amendment to the confidentiality regulations of the existing arbitration procedures should be made after the completion of this rulemaking.

[70] Specifically, the summaries should include: (i) the geographic region of the movement(s) at issue; (ii) the commodities at issue; (iii) the number of days from the commencement of the arbitration proceeding to the final arbitration decision; and (iv) a high-level, generic description of the resolution (e.g., settled, withdrawn, dismissed on market dominance, or challenged rates found unreasonable/reasonable).

Petitioners intended for the summary to be shared within the Board, including with the Board Members. The Board will propose that the Board Members be permitted to review the summaries so that they would be able to monitor how the arbitration program is being used in individual cases. Moreover, there would no requirement that the identity of the parties be revealed in the confidential summary, ensuring that that key aspect of confidentiality would be maintained. Lastly, the Board will clarify that parties would have to provide a confidential summary for any matter in which a shipper has submitted an Initial Notice to the carrier. See proposed § 1108.29(e). This would ensure that the Board is apprised of matters that are withdrawn or settled during the mediation period. As noted, the Board will also propose a provision requiring the agency to conduct an assessment of the effectiveness of the program in the future. (See infra Section XIII.)

However, as noted above, the Board will propose some modifications to Petitioners' confidentiality provisions, specifically regarding appeals of the arbitration decision to the Board. The Board discusses how confidentiality would apply to the different aspects of the proposed small rate case arbitration program below.

B. Arbitration Process and Decisions.

The Board will propose that the arbitration process be confidential, including discovery, filings to the arbitrators, the Initial Notice and OPAGAC confirmation letter, the Joint Notice, and confidentiality agreements concerning Waybill Sample data. By proposing to treat these materials as confidential, the Board would not publish them on its website or otherwise make them publicly available. The Board will also propose that any telephonic or virtual conference between the parties and the ALJ to resolve an objection to a party-appointed arbitrator, and rulings by the ALJ on for-cause objections, also be deemed confidential. Parties are invited to comment on whether such communications would constitute "dispute resolution communications" as defined by 5 U.S.C. 571(5), and as such would be exempt from disclosure under FOIA pursuant to 5 U.S.C. 574(j).

In regard to the Joint Notice, the definition of "dispute resolution communication" in 5 U.S.C. 571(5) does not include a "written agreement to enter into a dispute resolution proceeding." To ensure the confidentiality of the Joint Notice, the Board will not propose that the parties include an express statement that the parties agree to arbitrate in the Joint Notice. The fact that the parties agree to arbitrate is evidenced by their participation in the program. The Joint Notice would merely be a means to inform OPAGAC when the arbitration phase is underway regarding a dispute, as well as to notify the Director of OE to release the Waybill Sample data to which parties are entitled. As noted above, the Board will propose that specific information regarding pending arbitrations contained in both the Initial Notice and Joint Notice, including the identity of the parties, would not be disseminated within the Board beyond the alternative dispute resolution functions within OPAGAC.

As noted above, however, there is uncertainty about whether the Board would be required to publish and/or release the rulings from the Director of OE on requests for Waybill Sample data. See 49 CFR 1001.1 (specifying which Board records are available for public inspection); 49 U.S.C. 1306(b) (stating that rail matters require a "written statement of that action"); 5 U.S.C. 552(a)(2)(A) (requiring agencies to make certain documents available to the public under FOIA). These materials may not be produced in every arbitration, but for ones in which they are, their release could result in the disclosure of the existence of the arbitration and the identity of the participating parties. Parties are invited to comment on whether such materials require publication and/or whether there are alternative means of preserving the confidentiality of these materials.

Finally, under the Board's proposed procedures, neither the arbitration panel nor the parties would submit the arbitration decision to the Board unless it were appealed. Accordingly, in the absence of an appeal, the Board will not propose posting a redacted version of the arbitration decision on its website, as it does for arbitrations under the

existing arbitration program. (See 49 CFR 1108.9(g).) (The extent to which the arbitration decision can be kept confidential in the event of an appeal is discussed in the following section.)

The Board will also propose a requirement that parties enter into a Confidentiality Agreement, a model of which is included in Appendix A.

C. Appeals of Arbitration Decisions.

The Board will propose that all subsequent appellate submissions—including the arbitration decision, the petition to vacate or modify the arbitration award, and any reply—be filed under seal. However, the Board finds that Petitioners' proposal to have all appellate submissions remain under seal is inconsistent with 49 CFR 1104.14, which requires that "[w]hen confidential documents are filed, redacted versions must also be filed." In addition, while Petitioners have cited authority for the proposition that privacy and confidentiality can be important components of arbitration, there are countervailing concerns once a party seeks judicial or administrative review of arbitration decisions. Cf. Baxter v. Abbott Labs., 297 F.3d 544, 548 (7th Cir. 2002) (holding that parties' agreement to keep arbitration confidential does not confer the "right to keep third parties from learning what th[e] litigation is about"). In addition, Petitioners implicitly acknowledge that FOIA requires that Federal agencies make publicly available both "final opinions" as well as "orders" made in the "adjudication of cases." 5 U.S.C. 552(a)(2)(A). The fact that Board decisions would be public and precedential also weighs in favor of requiring public versions of the filings that led to and support the Board's decision.

Moreover, Petitioners have not explained (let alone acknowledged) whether and to what extent the Board could withhold these submissions should a third party seek access to them under the requestor provisions of FOIA. See 5 U.S.C. 552(a)(3) (requiring that agencies make records available to persons upon request). The Board can

withhold certain commercial information under the FOIA exemption at 5 U.S.C. 552(b)(4),[71] but that exemption may not be broad enough to cover the appellate submissions in their entirety, especially since certain aspects of the arbitration award may not be commercial (such as the arbitrator's reasoning).[72] Having the parties prepare public versions of their appellate submissions with commercial or financial information redacted would likely obviate at least some FOIA requests and place the Board in a more informed position to respond to any such request that is made.

The Board will therefore propose a process by which, following the filing of sealed appellate submissions—including the arbitration decision—the filing party would prepare a redacted, public version of those documents; provide the other party an opportunity to request further redactions; and submit the public version to the Board for filing. See proposed § 1108.31(a)(3).[73] Any such public version, and the material redacted therein, would be subject to a determination by the Board that the redacted information was not properly designated confidential or highly confidential, and an order from the Board that the public version be resubmitted without the unsupported redactions.

D. Board Decision of Arbitration Appeal.

The Board will propose procedures for making publicly available a redacted version of the Board's decision on appeal largely along the lines proposed by Petitioners, including a requirement that the Board pay particular attention to avoiding disclosure that

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[71] This exemption specifically exempts from FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

[72] Indeed, the Administrative Dispute Resolution Act expressly carves out final arbitration decisions from its definition of "dispute resolution communications," which accordingly subjects any such decisions in the government's possession to FOIA, provided another FOIA exemption does not apply. See 5 U.S.C. 571(5), 574(j).

[73] As noted above, see supra note 60, Petitioners' proposal that parties file a notice of appeal is not necessary, as appellate filings to the Board would be publicly filed.

would have an effect on the marketplace. The Board agrees that confidentiality would be a key component of the voluntary arbitration program and, as such, would strive to keep any redacted commercial or financial material within the underlying arbitration decision confidential, including, as appropriate, through redactions to the public version of the Board's decision. The Board notes, however, that it has modified the regulatory text suggested by Petitioners. The language proposed by Petitioners states that a "Board decision that denies the petition to modify or vacate will do so in a way that maintains the complete confidentiality of the arbitration decision." (Pet., App. A at 11.)[74] As explained above, however, parties will be required to prepare a redacted, public version of the arbitration decision for filing in the Board's docket, and hence the arbitration decision will necessarily not be "complete[ly] confidential[]."

Petitioners further propose that the Board shall "[i]n no event" disclose the specific relief awarded by the arbitration panel or by the Board, or the origin-destination pair involved in the arbitration. Although in most instances the Board would be able to rule on the appeal without having to disclose the arbitrators' award or origin-destination pair, the Board cannot be certain that this will always be possible, as it may need to address these aspects of the underlying arbitration decision to provide a clear explanation of its appellate ruling. For these reasons, the Board has modified Petitioners' proposed language to state that the Board will maintain the confidentiality of the arbitration decision—including the award and origin-destination pair—to the "maximum extent possible." Parties are invited to comment on whether the Board, should it have to reference the arbitrators' award and/or origin-destination pair in its decision, should redact this information from any decision that it makes publicly available, including

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[74] Petitioners also propose a provision which states that, "[i]n the event an arbitration decision is appealed to the Board . . . , the arbitration decision shall be filed under seal and . . . shall remain confidential on appeal." (Pet., App. A at 9.)

whether and to what extent it would be permitted to do so under FOIA.[75] In addition, the Board invites parties to comment on whether there are other categories of information that should not be publicly disclosed in its decision, beyond the specific relief awarded and any origin-destination pairs. See Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019) (suggesting that confidentiality under the FOIA exemption at 5 U.S.C. 552(b)(4) may turn on whether the government promises to keep the information private).

XII. Precedential Value.

Petitioners propose that arbitration decisions issued under the proposed program would have no precedential value and, as such, that past arbitration decisions would be deemed inadmissible. NGFA states it does not object to decisions having no precedential value. (NGFA Reply 8.) This would also be consistent with section 11708(d)(5), which expressly provides that arbitration decisions have no precedential effect in any other or subsequent arbitration dispute, as well as the Board's existing arbitration program at 49 CFR 1108.10. Accordingly, the Board will propose that arbitration decisions have no precedential value. The Board will also propose that any such decisions are inadmissible in other arbitrations.

XIII. Program Review.

Finally, the Board agrees with those shippers who have argued that there would be benefits to a review of the proposed small rate case arbitration program after a period of time to ensure that the program is working as intended and proving effective. (USDA Reply 3; NGFA Reply 5.) Petitioners have stated that they would agree to the Board

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[75] It should also be noted that, even if the Board were to redact this information, it is not the final arbiter in FOIA matters and thus cannot guarantee the continued confidentiality of material that Petitioners propose not be disclosed. See 5 U.S.C. 552(a)(4)(B) (authorizing federal district courts to review FOIA matters "de novo" and order production of agency records withheld under a FOIA exemption).

conducting such an assessment at the end of a three-year term. (Pet'rs Suppl. 5.) Accordingly, the Board will propose a provision that a review of the proposed program be conducted in the future. The Board will propose that the review occur after a reasonable number of arbitrations have been conducted, though not later than three years after start of the program. See proposed § 1108.32. Depending on the outcome of such review, the Board may determine that the arbitration program will continue or that the arbitration program should be terminated or modified at that time.

The Board seeks comment on how it would conduct such a review and the nature of the information it should seek to collect from those who have participated in the arbitration program, including whether the Board should require or request the submission of arbitration decisions as part of its review process.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. Sections 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," section 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

This proposal would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.[76] The proposal imposes upon small railroads no new record-keeping or reporting requirements. Nor does this proposed rule circumscribe or mandate any conduct by small railroads; participation in the arbitration program proposed here is strictly voluntary. To the extent that the rules have any impact, it would be to provide faster resolution of a controversy at a lower cost, especially relative to the Board's existing Stand-Alone Cost, Simplified-SAC, and Three-Benchmark tests. The $4 million relief cap and two-year prescription period would also limit a participating small railroad's total potential liability. Moreover, the purpose of the proposed rules is to create an arbitration process to resolve smaller rate disputes, but as the Board has previously concluded, the majority of railroads involved in rate proceedings are not small entities within the meaning of the RFA. Simplified Standards, EP 646 (Sub-No. 1), slip op. at 33-34. Since the inception of the Board in 1996, only three of the 51 cases challenging the reasonableness of freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimates that there are today approximately 656 Class III rail carriers. Therefore, the Board certifies under 5 U.S.C. 605(b) that this proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities as defined by the RFA.

This decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

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[76] For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a "small business" as only including those carriers classified as Class III rail carriers under 49 CFR 1201.1-1. See Small Entity Size Standards Under the Regul. Flexibility Act, 81 FR 42566 (June 30, 2016), EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting).

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and Appendix B, the Board seeks comments about the impact of the new collection for the Arbitration Program for Small Rate Cases (OMB Control No. 2140-XXXX), concerning: (1) whether the collections of information, as added in the proposed rule, and further described below, are necessary for the proper performance of the functions of the Board, including whether the collections have practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board estimates that the proposed new requirements would add a total hour burden of 273 hours. There are no non-hourly burdens associated with these collections. The Board welcomes comment on the estimates of actual time and costs of the collection of (a) Arbitration "Opt-In" Notices (b) Notices of Intent to Arbitrate, (c) Joint Notices to Arbitrate, (d) Post-Arbitration Summaries, and (e) Appeals of Arbitrators' Decision, as detailed below in Appendix B. Other information pertinent to these collections is also included in Appendix B. The proposed rule will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11. Comments received by the Board regarding these information collections will also be forwarded to OMB for its review when the final rule is published.

List of Subjects

49 CFR Part 1011

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

49 CFR Part 1108

Administrative practice and procedure, Railroads.

49 CFR Part 1115

Administrative practice and procedure.

49 CFR Part 1244

Freight, Railroads, Reporting and recordkeeping requirements.

It is ordered:

1. The Board proposes to amend its rules as detailed in this decision. Notice of the proposed rules will be published in the Federal Register.

2. Comments are due by January 14, 2022. Reply comments are due by March 15, 2022.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

4. This decision is effective on its service date.

Decided: November 12, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz. Board Member Begeman concurred in part with a separate expression. Board Member Primus concurred with a separate expression.

BOARD MEMBER BEGEMAN, concurring in part:

I am convinced that a voluntary arbitration program could provide a rate review alternative to litigation that some stakeholders might prefer. In fact, I have repeatedly voted to improve the Board's existing voluntary arbitration program, yet that program remains unused. That is why I welcomed Petitioners' proposal and supported instituting this proceeding under my Chairmanship, even planning that the Board would work to

propose a rule by March of this year. See Report on Pending STB Regul. Proc. Fourth Quarter 2020 at 9 (Jan. 4, 2021).

While I generally support the Board's attempt here to try yet again to establish a voluntary arbitration program that will be utilized, this time one designed for smaller rate disputes (and am pleased that the notice of proposed rulemaking is finally being issued and will provide the opportunity for public input), I do not support every aspect of this proposal. Most significantly, I strongly disagree with the decision calling into question whether the Board will *ever* adopt a rate review process to ensure shippers with smaller disputes have a means to formally challenge the reasonableness of a rate before the Board.

The Board's existing rate review processes are unworkable for shippers with smaller disputes, and frankly many with larger ones. As Olin Corporation correctly points out in its August 20, 2020 reply, the Board has an obligation to establish effective rate relief rules for *all* shippers, and that obligation is not discretionary.

BOARD MEMBER PRIMUS, concurring:

While I support the concept of arbitration and concur in this decision, regrettably, I do not believe the proposal will do enough on its own to adequately mitigate the small rate disputes that continue to negatively impact our national rail network. My doubts center on the railroads' history, or lack thereof, of participation in voluntary Board-sponsored arbitration.

On its face, arbitration can be a very useful tool to settle disputes between conflicting parties. However, it seems as if the railroads believe arbitration is a tool better kept unused and locked in the toolbox. Since the Board's implementation of arbitration nearly twenty-five years ago, there has not been one instance where the railroads have utilized the voluntary program. Even after the program was expanded five

years ago to include matters involving rate disputes, there continued to be no real desire to participate.

The railroads' hesitation to participate in arbitration seemed to have lessened with the establishment of the Board's Rate Reform Task Force in 2018 and the subsequent proposal of a new tool to address small rate disputes: Final Offer Rate Review (FORR). While forcefully condemning FORR, the railroads were quick to suggest that voluntary arbitration— the same tool that has yet to be used by a single Class I—should be the primary method with which to address small rate disputes. This significant change of heart would have been otherwise noteworthy had the railroads not followed it up by petitioning an unbalanced and essentially unworkable arbitration proposal to the Board.

It is critical the Board equip itself with the tools necessary to address the issues challenging our national rail network. A balanced and robust small rate case arbitration program is one such tool and can be extremely effective—if it is used. But given the railroads' lack of appetite for arbitration, I strongly feel it is now time to add FORR to the Board's toolbox as well. FORR is the perfect complement to arbitration and should not be seen as a competing interest, as both offer different methods to solve small rate case disputes. Accordingly, I concur with this decision with the hope that the implementation of FORR is not far behind.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1011, 1108, 1115, and 1244 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011 – BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

2. Amend § 1011.7 by revising paragraph (a)(2)(xix) and adding paragraph (b)(7) to read as follows:

§ 1011.7 Delegations of authority by the Board to specific offices of the Board.

(a) * * *

(2) * * *

(xix) To order arbitration of program-eligible matters under the Board's regulations at 49 CFR part 1108, subpart A, or upon the mutual request of parties to a proceeding before the Board.

(b) * * *

(7) Perform any arbitration duties specifically assigned to the Office of Public Assistance, Governmental Affairs, and Compliance or its Director in 49 CFR part 1108, subpart B.

PART 1108 – ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

3. The authority citation for part 1108 continues to read as follows:

Authority: 49 U.S.C. 11708, 49 U.S.C. 1321(a), and 5 U.S.C. 571 *et seq*.

§§ 1108.1 through 1108.13 [Designated as Subpart A]

4. Designate §§ 1108.1 through 1108.13 as subpart A and add a heading for subpart A to read as follows:

Subpart A—General Arbitration Procedures

§ 1108.1 [Amended]

5. Amend § 1108.1 by:

a. Removing the word "part" wherever it appears and adding "subpart" in its place; and

b. In paragraphs (a) and (b), removing "these rules" and adding "this subpart" in its place.

§§ 1108.3, 1108.7, and 1108.8 [Amended]

6. In addition to the amendments set forth above, in 49 CFR part 1108, remove the word "part" and add in its place the word "subpart" in the following places:

a. Section 1108.3(a)(1)(ii);

b. Section 1108.7(d); and

c. Section 1108.8(a).

7. Add subpart B to read as follows:

Subpart B—Voluntary Program for Arbitration of Small Freight Rail Rate Disputes

Sec.

Subpart B—Voluntary Program for Arbitration of Small Freight Rail Rate Disputes

§ 1108.21 Definitions.

As used in this subpart:

(a) *Arbitrator* means a single person appointed to arbitrate under this subpart.

(b) *Arbitration panel* means a group of three people appointed to arbitrate under this subpart.

(c) *Small Rate Case Arbitration Program* means the program established by the Surface Transportation Board in this subpart.

(d) *Arbitration decision* means the decision of the arbitration panel served on the parties as set forth in § 1108.27(c)(3).

(e) *Final Offer Rate Review* means the Final Offer Rate Review process for determining the reasonableness of railroad rates.

(f) *Lead arbitrator* means the third arbitrator selected by the two party-appointed arbitrators or, if the two party-appointed arbitrators cannot agree, an individual selected from the Board's roster of arbitrators using the alternating strike method set forth in § 1108.6(c).

(g) *Limit Price Test* means the methodology for determining market dominance described in *M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 11-18 (STB served Sept. 27, 2012).

(h) *Participating railroad* or *participating carrier* means a railroad that has voluntarily opted into the Small Rate Case Arbitration Program pursuant to § 1108.23(a).

(i) *Party-appointed arbitrator* means the arbitrator selected by each party pursuant to the process described in § 1108.26(b).

(j) *Pending arbitration* means an arbitration under this subpart in which the arbitration panel has not yet issued the arbitration decision, including a dispute being mediated in the pre-arbitration mediation permitted under § 1108.25(b).

(k) *Rate disputes* are disputes involving the reasonableness of a rail carrier's rates.

(l) *STB* or *Board* means the Surface Transportation Board.

(m) *STB-maintained roster* means the roster of arbitrators maintained by the Board, as required by § 1108.6(b), under the Board's arbitration program established pursuant to 49 U.S.C. 11708 and set forth in subpart A of this part.

(n) *Streamlined market dominance test* means the methodology set forth in 49 CFR 1111.12.

§ 1108.22 Statement of purpose, organization, and jurisdiction.

(a) *The Board's intent*. The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This subpart establishes a binding and voluntary arbitration program, the Small Rate Case Arbitration Program, that is tailored to rate disputes and open to all parties eligible to bring or defend rate disputes before the Board.

(1) The Small Rate Case Arbitration Program serves as an alternative to, and is separate and distinct from, the broader arbitration program set forth in subpart A of this part.

(2) By participating in the Small Rate Case Arbitration Program, parties consent to arbitrate rail rate disputes subject to the limits on potential liability set forth in § 1108.28.

(b) *Limitations to the use of the Small Rate Case Arbitration Program*. The Small Rate Case Arbitration Program may be used only for rate disputes within the statutory jurisdiction of the Board.

(c) *No limitation on other avenues of arbitration.* Nothing in this subpart shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

§ 1108.23 Participation in the Small Rate Case Arbitration Program.

(a) *Railroad opt-in procedures*--(1) *Opt-in notice*. To opt into the Small Rate Case Arbitration Program, a railroad may file a notice with the Board under Docket No. EP 765, notifying the Board of the railroad's consent to participate in the Small Rate Case Arbitration Program. Such notice may be filed at any time and shall be effective upon receipt by the Board or at another time specified in the notice. The notice should also include:

(i) A statement that the carrier agrees to an extension of the timelines set forth in 49 U.S.C. 11708(e) for any arbitrations initiated under this subpart; and

(ii) A statement that the carrier agrees to the appointment of arbitrators that may not be on the STB-maintained roster of arbitrator established under § 1108.6(b).

(2) *Participation for a specified term*. By opting into the Small Rate Case Arbitration Program, the carrier consents to participate in the program for a term expiring [five years after the effective date of the final rule]. A carrier may withdraw from the Program prior to [five years after the effective date of the final rule], only pursuant to paragraph (c) of this section.

(3) *Public notice of railroad participants*. The Board shall maintain a list of railroads who have opted into the Small Rate Case Arbitration Program on its website at *www.stb.gov*.

(4) *Class II and Class III carrier participation*. Class II or Class III rail carriers may consent to use the Small Rate Case Arbitration Program to arbitrate an individual rate dispute, even if the Class II or Class III has not opted into the process under paragraph (a)(1) of this section. If a Class II or Class III carrier intends to participate for an individual rate dispute, a letter from the Class II or Class III carrier should be submitted with the notice of intent to arbitrate dispute required under § 1108.25(a). The letter should indicate that the carrier consents to participate in the Small Rate Case Arbitration Program and include the statements required under paragraphs (a)(1)(i) and (ii) of this section.

(b) *Shipper/complainant participation*. A shipper or other complainant seeking to challenge the reasonableness of carrier's rate may participate in the Small Rate Case Arbitration Program on a case-by-case basis by notifying a participating carrier that it wishes to arbitrate an eligible dispute under the Small Rate Case Arbitration Program by filing a written notice of intent to arbitrate with the participating carrier, as set forth in § 1108.25(a).

(c) *Withdrawal for change in law*--(1) *Basis for withdrawal*. A carrier or shipper/complainant participating in the Small Rate Case Arbitration Program may withdraw its consent to arbitrate under this subpart if either: the Board makes any material change(s) to the Small Rate Case Arbitration Program under this subpart after a shipper/complainant or railroad has opted into the Small Rate Case Arbitration Program; or the Board makes any material change(s) to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper/complainant or railroad has opted into the Small Rate Case Arbitration Program. However, the Board's adoption of the Final Offer Rate Review process would not be considered a change in law.

(2) *Procedures for withdrawal for change in law*. A participating carrier or shipper/complainant may withdraw its consent to arbitrate under this subpart by filing with the Board a notice of withdrawal for change in law within 10 days of an event that qualifies as a basis for withdrawal as set forth in paragraph (c)(1) of this section.

(i) The notice of withdrawal for change in law shall state the basis or bases under paragraph (c)(1) of this section for the party's withdrawal of its consent to arbitrate under this part. A copy of the notice should be served on any parties with which the carrier is currently engaged in arbitration. A copy of the notice will also be posted on the Board's website.

(ii) Any party may challenge the withdrawing party's withdrawal for change in law on the ground that the change is not material by filing a petition with the Board within 10 days of the filing of the notice of withdrawal being challenged. The withdrawing party may file a reply to the petition within 5 days from the filing of the petition. The petition shall be resolved by the Board within 14 days from the filing deadline for the withdrawing party's reply.

(iii) Subject to the stay provision of paragraph (c)(3)(ii) of this section, the notice of withdrawal for change in law shall be effective on the day of its filing.

(3) *Effect of withdrawal for change in law*--(i) *Arbitrations with decision*. The withdrawal of consent for change in law by either a shipper/complainant or carrier shall not affect arbitrations in which the arbitration panel has issued an arbitration decision.

(ii) *Arbitrations without decision*. A carrier or shipper/complainant filing a withdrawal of consent for change in law shall immediately inform the arbitration panel and opposing party. The arbitration panel shall immediately stay the arbitration. If no objection to the withdrawal of consent is filed with the Board or the Board issues a decision granting the withdrawal request, the arbitration panel shall dismiss any pending arbitration under this part, unless the change in law will not take effect until after the

arbitration panel is scheduled to issue its decision pursuant to the schedule set forth in § 1108.27(c). If an objection to the withdrawal of consent is filed and the Board denies the withdrawal, the arbitration panel shall lift the stay, the arbitration shall continue, and all procedural time limits will be tolled.

(d) *Limit on the number of arbitrations*. A carrier participating in the Small Rate Case Arbitration Program is only required to participate in 25 arbitrations during a rolling 12-month period. Any arbitrations initiated by the submission of the notice of intent to arbitrate a dispute to the rail carrier (pursuant to § 1108.25(a)) that has reached this limit can be postponed until the carrier is once again below the limit.

(1) A carrier that has reached the limit may notify the Board's Office of Public Assistance, Governmental Affairs, and Compliance by e-mail (to *rcpa@stb.gov*), as well as the shipper who submitted the notice of intent to arbitrate to the carrier. The Office of Public Assistance, Governmental Affairs, and Compliance shall confirm that the limitation has been reached and inform the shipper (and any other subsequent shippers) that the arbitration is being postponed, along with an approximation of when the arbitration can proceed and instructions for reactivating the arbitration once the carrier is again below the limit.

(2) An arbitration will only count toward the 25-arbitration limit upon commencement of the first mediation session or, where one or both parties elect to forgo mediation, submission of the joint notice of intent to arbitrate to the Board under § 1108.25(c).

§ 1108.24 Use of the Small Rate Case Arbitration Program.

(a) *Eligible matters*. The arbitration program under this subpart may be used only in the following instances:

(1) Rate disputes involving shipments of regulated commodities not subject to a rail transportation contract are eligible to be arbitrated under this subpart. If the parties

dispute whether a challenged rate was established pursuant to 49 U.S.C. 10709, the parties must petition the Board to resolve that dispute, which must be resolved before the parties initiate the arbitration process under this part.

(2) A shipper may challenge rates for multiple traffic lanes within a single arbitration under this part, subject to the relief cap in § 1108.28 for all lanes.

(3) For movements in which more than one carrier participates, arbitration under this subpart may be used only if all carriers agree to participate (pursuant to § 1108.23(a)(1) or (4)).

(b) *Eligible parties.* Any party eligible to bring or defend a rate dispute before the Board is eligible to participate in the arbitration program under this part.

(c) *Use limits*. A shipper/complainant may bring a maximum of one arbitration per individual railroad at a time. For purposes of this paragraph (c), an arbitration under this subpart is final, and a new arbitration may be brought against the defendant carrier by the shipper/complainant, when the arbitration panel issues its arbitration decision, or if an arbitration is dismissed or withdrawn, including due to settlement.

(d) *Arbitration clauses*. Nothing in the Board's regulations in this part shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers/complainants and carriers.

§ 1108.25 Arbitration initiation procedures.

(a) *Notice of shipper/complainant intent to arbitrate dispute*. To initiate the arbitration process under this subpart against a participating railroad, a shipper/complainant must notify the railroad in writing of its intent to arbitrate a dispute under this part. The notice must include: a description of the dispute sufficient to indicate that the dispute is eligible to be arbitrated under this part; a statement that the shipper/complainant consents to extensions of the timelines set forth in forth in 49 U.S.C. 11708(e); and a statement that the shipper/complainant consents to the appointment of

arbitrators that may not be on the STB-maintained roster of arbitrators established under § 1108.6(b). The shipper/complainant must also submit a copy of the notice to the Board's Office of Public Assistance, Governmental Affairs, and Compliance by e-mail to *rcpa@stb.gov*. Upon receipt of the notice of intent to arbitrate, the Office of Public Assistance, Governmental Affairs, and Compliance will provide a letter to both parties confirming that the arbitration process has been initiated, and that the parties have consented to extension of the timelines set forth in 49 U.S.C. 11708(e) and the potential appointment of arbitrators not on the Board's roster. The notice and confirmation letter from the Office of Public Assistance, Governmental Affairs, and Compliance will be confidential and specific information regarding pending arbitrations, including the identity of the parties, would not be disseminated within the Board beyond the alternative dispute resolution functions within the Office of Public Assistance, Governmental Affairs, and Compliance.

(b) *Pre-arbitration mediation*. (1) Prior to commencing arbitration, the parties to the dispute may engage in mediation if they mutually agree.

(2) Such mediation will not be conducted by the STB. The parties to the dispute must jointly designate a mediator and schedule the mediation session(s).

(3) Mediation shall be initiated by the shipper/complainant's notice of intent to arbitrate under this part. The parties must schedule mediation promptly and in good faith after the shipper/complainant has submitted its notice of intent to arbitrate to the participating carrier. The mediation period shall end 30 days after the date of the first mediation session, unless both parties agree to a different period.

(c) *Joint Notice of Intent to Arbitrate.* (1) To arbitrate a rate dispute under this subpart, the parties must submit a Joint Notice of Intent to Arbitrate with the Board's Office of Public Assistance, Governmental Affairs, and Compliance, indicating the parties' intent to arbitrate under the Small Rate Case Arbitration Program. The parties

should submit a copy of the notice to the Board's Office of Public Assistance, Governmental Affairs, and Compliance by e-mail to *rcpa@stb.gov*. The joint notice must be filed not later than two business days following the date on which mediation ends or, in cases in which the parties mutually agree not to engage in mediation, two business days after the shipper/complainant submits its notice of intent to arbitrate (required by paragraph (a) of this section) to the carrier.

(2) The joint notice shall set forth the following information:

(i) The basis for the Board's jurisdiction; and

(ii) The basis for the parties' eligibility to use the Small Rate Case Arbitration Program, including: that the dispute being arbitrated is solely a rate dispute involving shipments of regulated commodities not subject to a rail transportation contract; that the railroad has opted into the Small Rate Case Arbitration Program; that the shipper/complainant has elected to use the Small Rate Case Arbitration Program for this particular rate dispute; and that the shipper/complainant does not have any other pending arbitrations at that time against the defendant railroad.

(3) The joint notice shall be confidential and will not be published on the Board's website and specific information regarding pending arbitrations, including the identity of the parties, would not be disseminated within the Board beyond the alternative dispute resolution functions within the Office of Public Assistance, Governmental Affairs, and Compliance.

(4) Unless the parties have agreed not to request the Waybill Sample data pursuant allowed under § 1108.27(g), the parties must also submit a copy of the Joint Notice of Intent to Arbitrate on the Director of the Board's Office of Economics, along with a letter providing the five-digit Standard Transportation Commodity Code information necessary for the Office of Economics to produce the unmasked confidential

Waybill Sample. Parties may submit the letter and copy of the joint notice by e-mail to *Economic.Data@stb.gov*.

§ 1108.26 Arbitrators.

(a) *Decision by arbitration panel.* All matters arbitrated under this subpart shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators*. Within two business days of filing the Joint Notice of Intent to Arbitrate, each side shall select one arbitrator as its party-appointed arbitrator and notify the opposing side of its selection.

(1) *For-cause objection to party-appointed arbitrator*. Each side may object to the other side's selected arbitrator within two business days and only for cause. A party may make a for-cause objection where it has reason to believe a proposed arbitrator cannot act with the good faith, impartiality, and independence required of 49 U.S.C. 11708, including due to a conflict of interest, adverse business dealings with the objecting party, or actual or perceived bias or animosity toward the objecting party.

(i) The parties must confer over the objection within two business days.

(ii) If the objection remains unresolved after the parties confer, the objecting party shall immediately file an Objection to Party-Appointed Arbitrator with the Office of Public Assistance, Governmental Affairs, and Compliance. The Office of Public Assistance, Governmental Affairs, and Compliance shall arrange for a telephonic or virtual conference to be held before an Administrative Law Judge within two business days, or as soon as is practicable, to hear arguments regarding the objection(s). The Administrative Law Judge will provide its ruling in an order to all parties by the next business day after the telephonic or virtual conference.

(iii) The Objection to Party-Appointed Arbitrator filed with Office of Public Assistance, Governmental Affairs, and Compliance and the telephonic or virtual conference including any ruling on the objection, shall be confidential.

(2) *Costs for party-appointed arbitrators*. Each side is responsible for the costs of its own party-appointed arbitrator.

(c) *Lead arbitrator*--(1) *Appointment*. Once appointed, the two party-appointed arbitrators shall, without delay, select a lead arbitrator from a joint list of arbitrators provided by the parties.

(2) *Disagreement selecting the lead arbitrator*. If the two party-appointed arbitrators cannot agree on a selection for the lead arbitrator, the party-appointed arbitrators will select the lead arbitrator from the STB-maintained roster of arbitrators using the process set forth in § 1108.6(c).

(3) *Lead arbitrator role*. The lead arbitrator will be responsible for ensuring that the tasks detailed in §§ 1108.27 and 1108.29 are accomplished. The lead arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirements of the rules of this subpart.

(4) *Costs*. The parties to the arbitration will share the cost of the lead arbitrator equally.

(d) *Arbitrator choice*. The parties may choose their arbitrators without limitation, provided that any arbitrator chosen must be able to comply with paragraph (f) of this section. The arbitrators may, but are not required to, be selected from the STB-maintained roster described in § 1108.6(b).

(e) *Arbitrator incapacitation*. If at any time during the arbitration process an arbitrator becomes incapacitated or is unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by the following process:

(1) If the incapacitated arbitrator was a party-appointed arbitrator, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in paragraph (b) of this section.

(2) If the incapacitated arbitrator was the lead arbitrator, a replacement lead arbitrator shall be appointed pursuant to the procedures set forth in paragraph (c) of this section.

(f) *Arbitrator duties*. In an arbitration under this subpart, the arbitrators shall perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence.

§ 1108.27 Arbitration procedures.

(a) *Appointment of arbitration panel*. Within two business days after all three arbitrators are selected, the parties shall appoint the arbitration panel in writing. A copy of the written appointment should be submitted to the Director of the Board's Office of Economics. The Director shall promptly provide the arbitrators with the confidentiality agreements that are required under § 1244.9(b)(4) of this chapter to review confidential Waybill Sample data.

(b) *Commencement of arbitration process; arbitration agreement*. Within two business days after the arbitration panel is appointed, the lead arbitrator shall commence the arbitration process in writing. Shortly after commencement, the parties, together with the panel of arbitrators, shall create a written arbitration agreement, which at a minimum will state with specificity the issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed. The arbitration agreement shall also incorporate by reference the rules of this subpart. The agreement may also contain other mutually agreed upon provisions.

(c) *Expedited timetables*--(1) *Discovery phase*. The parties shall have 45 days from the written commencement of arbitration by the lead arbitrator to complete discovery. The arbitration panel may extend the discovery phase upon an individual party's request, but such extension shall not operate to extend the overall duration of the

evidentiary phase under paragraph (c)(2) of this section, unless separately agreed to pursuant to paragraph (c)(2) of this section.

(2) *Evidentiary phase*. The evidentiary phase consists of the 45-day discovery phase described in paragraph (c)(1) of this section and an additional 45 days for the submission of pleadings or evidence, based on the procedural schedule adopted by the lead arbitrator, for a total duration of 90 days. The evidentiary phase (including the discovery phase) shall begin on the written commencement of the arbitration process under paragraph (b) of this section. The parties may mutually agree to extend the entire evidentiary phase or a party may unilaterally request an extension from the arbitration panel.

(3) *Decision*. The unredacted arbitration decision, as well as any redacted version(s) of the arbitration decision as required by § 1108.29(a)(2), shall be served on the parties within 30 days from the end of the evidentiary phase.

(d) *Limited discovery*. Discovery under this subpart shall be limited to 20 written document requests and 5 interrogatories. Depositions shall not be permitted.

(e) *Evidentiary guidelines*--(1) *Principles of due process.* The lead arbitrator shall adopt rules that comply with the principles of due process, including but not limited to, allowing the defendant carrier a fair opportunity to respond to the shipper/complainant's case-in-chief.

(2) *Inadmissible evidence*. The following evidence shall be inadmissible in an arbitration under this part:

(i) On the issue of market dominance, any evidence that would be inadmissible before the Board; and

(ii) Any non-precedential decisions, including prior arbitrations.

(f) *Confidentiality agreement*. All arbitrations under this subpart shall be governed by a confidentiality agreement, unless the parties agree otherwise. With the

exception of the Waybill Sample provided pursuant to paragraph (g) of this section, the terms of the confidentiality agreement shall apply to all aspects of an arbitration under this part, including but not limited to discovery, party filings, and the arbitration decision.

(g) *Waybill Sample*. (1) The Board's Office of Economics shall provide unmasked confidential Waybill Sample data to each party to the arbitration proceeding within seven days of the filing of a copy Joint Notice of Intent to Arbitrate with the Director and accompanying letter containing the relevant five-digit Standard Transportation Commodity Code information. Such data to be provided by the Office of Economics shall be limited to only the following data:

(i) The most recent four years;

(ii) Movements with revenue to variable cost (R/VC) ratio above 180%;

(iii) Movements on defendant carrier(s); and

(iv) Movements with same five-digit Standard Transportation Commodity Code as the challenged movements.

(2) Parties may request additional Waybill Sample data pursuant to § 1244.9(b)(4) of this chapter.

§ 1108.28 Relief.

(a) *Relief available.* Subject to the relief limits set forth in paragraph (b) of this section, the arbitration panel under this subpart may grant relief in the form of monetary damages or a rate prescription.

(b) *Relief limits.* Any relief awarded by the arbitration panel under this subpart shall not exceed $4 million (as indexed annually for inflation using the Consumer Price Index and a 2020 base year) over two years, inclusive of prospective rate relief, reparations for past overcharges, or any combination thereof, unless otherwise agreed to by the parties. Reparations or prescriptions may not be set below 180% of variable cost, as determined by unadjusted Uniform Railroad Costing System (URCS).

(c) *Agreement to a different relief cap*. For an individual dispute, parties may agree by mutual written consent to arbitrate an amount above or below the monetary cap in paragraph (b) of this section, up to $25 million, or for shorter or longer than two years, but no longer than 5 years. Parties should inform the Board of such agreement in the confidential summary filed at the conclusion of the arbitration, as required by § 1108.29(e)(1).

(d) *Relief not available*. No injunctive relief shall be available in arbitration proceedings under this part.

§ 1108.29 Decisions.

(a) *Technical requirements*--(1) *Findings of fact and conclusions of law.* An arbitration decision under this subpart shall be in writing and shall contain findings of fact and conclusions of law.

(2) *Compliance with confidentiality agreement*. The unredacted arbitration decision served on the parties in accordance with § 1108.27(c)(3) shall comply with the confidentiality agreement described in § 1108.27(f). As applicable, the arbitration panel shall also provide the parties with a redacted version(s) of the arbitration decision that redacts or omits confidential and/or highly confidential information as required by the governing confidentiality agreement.

(b) *Substantive requirements*. The arbitration panel under this subpart shall decide the issues of both market dominance and maximum lawful rate.

(1) *Market dominance*. (i) The arbitration panel shall determine if the railroad whose rate is the subject of the arbitration has market dominance based on evidence submitted by the parties, unless paragraph (b)(1)(vi) of this section applies.

(ii) Subject to § 1108.27(e)(2), in determining the issue of market dominance, the arbitration panel under this subpart shall follow, at the complainant's discretion, either the streamlined market dominance test or the non-streamlined market dominance test.

(iii) The arbitration panel shall issue its decision on market dominance as part of its final arbitration decision.

(iv) The arbitration panel shall not consider evidence of product and geographic competition when deciding market dominance.

(v) The arbitration panel shall not consider evidence on the Limit Price Test when deciding market dominance.

(vi) If a carrier concedes that it possesses market dominance, the arbitration panel need not make a determination on market dominance and need only address the maximum lawful rate in the arbitration decision. Additionally, the parties may jointly request that the Board determine market dominance prior to initiating arbitration under this part.

(2) *Maximum lawful rate.* Subject to the requirements on inadmissible evidence in § 1108.27(e)(2), in determining the issue of maximum lawful rate, the arbitration panel under this subpart shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. 10704(a)(2)). The arbitration panel may otherwise base its decision on the Board's existing rate review methodologies, revised versions of those methodologies, new methodologies, or market-based factors, including: rate levels on comparative traffic; market factors for similar movements of the same commodity; and overall costs of providing the rail service. The arbitration panel's decision must be consistent with sound principles of rail regulation economics.

(3) *Agency precedent.* Decisions rendered by the arbitration panel under this subpart may be guided by, but need not be bound by, agency precedent.

(c) *Confidentiality of arbitration decision.* The arbitration decision under this part, whether redacted or unredacted, shall be confidential, subject to the limitations set forth in § 1108.31(d).

(1) No copy of the arbitration decision shall be served on the Board except as is required under § 1108.31(a)(1).

(2) The arbitrators and parties shall have a duty to maintain the confidentiality of the arbitration decision, whether redacted or unredacted, and shall not disclose any details of the arbitration decision unless, and only to the extent, required by law.

(d) *Arbitration decisions are binding*. (1) By arbitrating pursuant to the procedures under this part, each party to the arbitration agrees that the decision and award of the arbitration panel shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in § 1108.31.

(2) An arbitration decision under this subpart shall preclude the shipper(s)/complainant(s) from filing any rate complaint for the movements at issue in the arbitration or instituting any other proceeding regarding the rates for the movements at issue in the arbitration, with the exception of appeals under § 1108.31. This preclusion shall last until the later of:

(i) Two years after the Joint Notice of Intent to Arbitrate; or

(ii) The expiration of the term of any prescription imposed by the arbitration decision.

(3) The preclusion will cease if the carrier increases the rate either: after a shipper/complainant is unsuccessful in arbitration or after a shipper/complainant has been awarded a prescription and the prescription has expired.

(e) *Confidential summaries of arbitrations; quarterly reports*. To permit the STB to monitor the Small Rate Case Arbitration Program, the parties shall submit a confidential summary of the arbitration to the Board's Office of Public Assistance,

Governmental Affairs, and Compliance (OPAGAC) within 14 days after either the arbitration decision is issued, the dispute settles, or the dispute is withdrawn. A confidential summary must be filed for any instance in which a shipper/complainant has submitted to the participating carrier a notice of intent to arbitrate, even if the parties did not reach the arbitration phase. The confidential summary itself shall not be published. OPAGAC will provide copies of the confidential summaries to the Board Members and other appropriate Board employees.

(1) *Contents of confidential summary*. The confidential summary shall provide only the following information to the Board with regard to the dispute arbitrated under this part:

(i) Geographic region of the movement(s) at issue;

(ii) Commodities shipped;

(iii) Number of calendar days from the commencement of the arbitration proceeding to the conclusion of the arbitration;

(iv) Resolution of the arbitration, limited to the following descriptions: settled, withdrawn, dismissed on market dominance, challenged rate(s) found unreasonable/reasonable; and

(v) Any agreement to a different relief cap or period than set forth in § 1108.28(b).

(2) *STB quarterly reports on Small Rate Case Arbitration Program*. The STB may publish public quarterly reports on the final disposition of arbitrated rate disputes under the Small Rate Case Arbitration Program.

(i) If issued, the Board's quarterly reports on the Small Rate Case Arbitration Program shall disclose only the five categories of information listed in paragraph (e)(1) of this section. The parties to the arbitration who filed the confidential summary shall not be disclosed.

(ii) If issued, the Board's quarterly reports on the Small Rate Case Arbitration Program shall be posted on the Board's website.

§ 1108.30 No precedent.

Arbitration decisions under this subpart shall have no precedential value, and their outcomes and reasoning may not be submitted into evidence or argued in subsequent arbitration proceedings conducted under this subpart or in any Board proceeding, except an appeal of the arbitration decision under § 1108.31.

§ 1108.31 Enforcement and appeals.

(a) *Appeal to the Board*--(1) *Petition to vacate or modify arbitration decision*. A party appealing the arbitration decision shall file under seal a petition to modify or vacate the arbitration decision, setting forth its full argument for vacating or modifying the decision. The petition to vacate or modify the arbitration decision must be filed within 20 days from the date on which the arbitration decision was served on the parties. The party appealing must include both a redacted and unredacted copy of the arbitration decision.

(2) *Replies*. Replies to the petition shall be filed under seal within 20 days of the filing of the petition to vacate or modify with the Board. Replies shall be subject to the page limitations of § 1115.2(d) of this chapter.

(3) *Confidentiality of filings; public docket*. All submissions for appeals of the arbitration decision to the Board shall be filed under seal. After the party has submitted a filing to the Board, the party shall prepare a public version of the filing with confidential commercial information redacted and provide the opposing party an opportunity to request further redactions. After consulting with the opposing party on redactions, the party shall file the public version with the Board for posting on its website.

(4) *Page limitations*. The petition shall be subject to the page limitations of § 1115.2(d) of this chapter.

(5) *Service*. Copies of the petition to vacate or modify and replies shall be served upon all parties in accordance with the Board's rules at part 1104 of this chapter. The appealing party shall also serve a copy of its petition to vacate or modify upon the arbitration panel.

(b) *Board's standard of review.* The Board's standard of review of arbitration decisions under this subpart shall be limited to determining only whether:

(1) The decision is consistent with sound principles of rail regulation economics;

(2) A clear abuse of arbitral authority or discretion occurred;

(3) The decision directly contravenes statutory authority; or

(4) The award limitation was violated.

(c) *Relief available on appeal to the Board*. Subject to the Board's limited standard of review as set forth in paragraph (b) of this section, the Board may affirm, modify, or vacate an arbitration award in whole or in part, with any modifications subject to the relief limits set forth in § 1108.28.

(d) *Confidentiality of Board's decision on appeal*--(1) *Scope of confidentiality*. The Board's decision will be public but shall maintain the confidentiality of the arbitration decision to the maximum extent possible, giving particular attention to avoiding the disclosure of information that would have an effect or impact on the marketplace, including the specific relief awarded by the arbitration panel, if any, or by the Board; or the origin-destination pair(s) involved in the arbitration.

(2) *Opportunity to propose redactions to the Board decision.* Before publishing the Board's decision, the Board shall serve only the parties with a confidential version of its decision in order to provide the parties with an opportunity to file confidential requests for redaction of the Board's decision.

(i) A request for redaction may be filed under seal within 5 days after the date on which the Board serves the parties with the confidential version of its decision.

(ii) The Board will publish its decision(s) on any requests for redaction in a way that maintains the confidentiality of any information the Board determines should be redacted.

(e) *Reviewability of Board decision*. Board decisions affirming, vacating, or modifying arbitration awards under this subpart are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(f) *Appeals subject to the Federal Arbitration Act*. Nothing in this subpart shall prevent parties to arbitration from seeking judicial review of arbitration awards in a court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. 9-13, in lieu of seeking Board review.

(g) *Staying arbitration decision*. The timely filing of a petition with the Board to modify or vacate the arbitration decision will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(h) *Enforcement.* A party seeking to enforce an arbitration decision under this subpart must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. 9-13.

§ 1108.32 Assessment of the Small Rate Case Arbitration Program.

The Board will conduct an assessment of the Small Rate Case Arbitration Program to determine if the program is providing an effective means of resolving rate disputes for small cases. The Board's assessment will occur upon the completion of a reasonable number of arbitration proceedings such that the Board can conduct a comprehensive assessment, though not later than three years after start of the program. In conducting this assessment, the Board will obtain feedback from parties that have used the arbitration process. Depending on the outcome of such review, the Board may determine that the arbitration program will continue or that the arbitration program should be terminated or modified at that time.

§ 1108.33 Exemption from Final Offer Rate Review.

Railroads that opt into the arbitration program under § 1108.23(a) will be exempt from having their rates challenged under Final Offer Rate Review (if in effect). The exemption will terminate upon the effective date of the participating carrier no longer participating in the arbitration program under this part, including, due to withdrawal from the arbitration program, as set forth in § 1108.23(c), or termination by the Board of the arbitration program following an assessment under § 1108.32. Upon termination of the exemption, parties are permitted to challenge a carrier's rate using Final Offer Rate Review (if in effect).

PART 1115 – APPELLATE PROCEDURES

8. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

9. Revise the third sentence of § 1115.8 to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

* * * For arbitrations authorized under part 1108, subparts A and B, of this chapter, the Board's standard of review of arbitration decisions will be narrow, and relief will

only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated.*

* *

PART 1244 – WAYBILL ANALYSIS OF TRANSPORTATION OF PROPERTY—RAILROADS

10. The authority citation for part 1244 continues to read as follows:

Authority: 49 U.S.C. 1321, 10707, 11144, 11145.

11. Revise § 1244.9(b)(4) to read as follows:

§ 1244.9 Procedures for the release of waybill data.

* * * * *

(b) * * *

(4) *Transportation practitioners, consulting firms, and law firms—specific proceedings*. Transportation practitioners, consulting firms, and law firms may use data from the STB Waybill Sample in preparing verified statements to be submitted in formal proceedings before the STB and/or State Boards (Board), or in preparing documents to be submitted in arbitration matters under part 1108, subpart B, of this chapter, subject to the following requirements:

(i) The STB Waybill Sample is the only single source of the data or obtaining the data from other sources is burdensome or costly, and the data is relevant to issues in a pending formal proceeding before the Board or in arbitration matters under part 1108, subpart B, of this chapter (when seeking data beyond the automatic waybill data release under § 1108.27(g) of this chapter).

(ii) The requestor submits to the STB a written waybill request that complies with paragraph (e) of this section or is part of the automatic waybill data release under

§ 1108.27(g) of this chapter for use in arbitrations pursuant to part 1108, subpart B, of this chapter.

(iii) All waybill data must be returned to the STB, and the practitioner or firm must not keep any copies.

(iv) A transportation practitioner, consulting firm, or law firm must submit any evidence drawn from the STB Waybill Sample only to the Board or to an arbitration panel impaneled under part 1108, subpart B, of this chapter, unless the evidence is aggregated to the level of at least three shippers and will prevent the identification of an individual railroad. Nonaggregated evidence submitted to the Board will be made part of the public record only if the Board finds that it does not reveal competitively sensitive data. However, evidence found to be sensitive may be provided to counsel or other independent representatives for other parties subject to the usual and customary protective order issued by the Board or appropriate authorized official.

(v) When waybill data is provided for use in a formal Board proceeding, a practitioner or firm must sign a confidentiality agreement with the STB agreeing to the restrictions specified in paragraphs (b)(4)(i) through (iv) of this section before any data will be released. This agreement will govern access and use of the released data for a period of one year from the date the agreement is signed by the user. If the data is required for an additional period of time because a proceeding is still pending before the Board or a court, the practitioner or firm must sign a new confidentiality agreement covering the data needed for each additional year the proceeding is opened.

(vi) When waybill data is provided for use in arbitrations pursuant to part 1108, subpart B, of this chapter, the transportation practitioners, consulting firms, or law firms representing parties to the arbitration and each arbitrator must sign a confidentiality agreement with the STB agreeing to the restrictions specified in paragraphs (b)(4)(i) through (iv) of this section before any data will be released. The agreement with

practitioners and firms will govern access and use of the released data for a period of one year from the date the agreement is signed by the user. If the data is required for an additional period of time because an arbitration or appeal of an arbitration is still pending before the Board or a court, the practitioner or firm must sign a new confidentiality agreement covering the data needed for each additional year the arbitration or appeal is pending. The agreement with each arbitrator will allow that arbitrator to review any evidence that includes confidential waybill data in a particular arbitration matter.

* * * * *

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A

MODEL CONFIDENTIALITY AGREEMENT

FOR SMALL RATE CASE ARBITRATION PROGRAM PROCEEDINGS

ARBITRATION NO. _____

[NAME OF COMPLAINANT] v. [NAME OF DEFENDANT RAIL CARRIER]

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1. Pursuant to 49 CFR 1108.27(f), all information, data, documents, or other material (hereinafter collectively referred to as "material") that is produced in discovery to another party to this proceeding or submitted in pleadings will be designated "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

   a. Shall be used solely for the purpose of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.

   b. May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Confidentiality Agreement, agrees to

be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

c. Must be destroyed by the requesting party, its employees, counsel, and agents at the completion of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Confidentiality Agreement, including under Paragraph 10.

d. Shall, in order to be kept confidential, be filed with the arbitration panel only in a package clearly marked on the outside "Confidential Materials Subject to Confidentiality Agreement."

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as "HIGHLY CONFIDENTIAL."

If any party wishes to challenge such designation, the party may bring such matter to the attention of the arbitration panel. Material that is so designated may be disclosed only to outside counsel in this arbitration, transportation practitioners, and those individuals working with or assisting such counsel or practitioners who are not regular employees of the party represented, who have a need to know, handle, or review the materials for purposes of this proceeding and any STB or judicial review or enforcement proceeding arising herefrom, provided that such individuals have been given and have read a copy of this Confidentiality Agreement, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to

all of the other provisions of this Confidentiality Agreement, including without limitation Paragraph 1.

3. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation. The party who received the material without the "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation will agree to treat the material as highly confidential, unless that party wishes to challenge that designation as set forth in Paragraph 2.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use "HIGHLY CONFIDENTIAL" material at oral arguments or presentations in this arbitration, or in any STB or judicial review or enforcement proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "HIGHLY

CONFIDENTIAL" material to the arbitration panel, the Board, or the court, as appropriate, with a written request that the arbitration panel, Board, or court: (a) restrict attendance at the hearings during discussion of such "HIGHLY CONFIDENTIAL" material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Confidentiality Agreement.

6. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Confidentiality Agreement, the party so required shall notify the producing party in writing within 3 business days of the determination that such material is to be released, or within 3 business days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
7. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Confidentiality Agreement even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.
8. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. If a party (the "submitting party") submits and serves upon the other party (the "reviewing party") a written submission or evidence containing the "HIGHLY CONFIDENTIAL" material of the submitting party, the submitting party shall also contemporaneously provide to outside counsel for the reviewing party a

"CONFIDENTIAL" version of such filing that redacts any "HIGHLY CONFIDENTIAL" information of the filing party that cannot be viewed by the in-house personnel of the reviewing party. Such Confidential Version may be provided in a .pdf or other electronic format.

9. At the conclusion of the arbitration, the parties shall make no public statements or representations about the arbitration, except for the confidential summary provided to the STB pursuant to 49 CFR 1108.29(e).
10. Appeals of the arbitration decision to the STB shall be subject to the confidentiality provisions of 49 CFR 1108.31(a) and (d). Parties may designate portions of their pleadings in such a proceeding to be CONFIDENTIAL or HIGHLY CONFIDENTIAL, pursuant to the provisions of Paragraph 2.

Appendix B

Information Collection Under the Paperwork Reduction Act

As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501-3521, the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the new information collection, Arbitration Program for Small Rate Cases, encompassing (a) Arbitration "Opt-In" Notices, (b) Initial Notices of Intent to Arbitrate, (c) Joint Notices to Arbitrate, (d) Post-Arbitration Summaries, and (e) Appeals of Arbitrators' Decision, as described in the Collection below. The proposed new collection necessitated by this notice of proposed rulemaking (NPRM) is expected to provide parties with additional options for resolution of smaller rail rate disputes and will further the Board's policy favoring the use of mediation and arbitration procedures.

Description of Collection

Title: Arbitration Program for Small Rate Cases

OMB Control Number: 2140-XXXX

STB Form Number: None

Type of Review: New Collection

Respondents: Parties seeking to arbitrate certain small rate case matters under a program administered by the Board

Number of Respondents: 30

Estimated Time Per Response:

Estimated Hours per Response

Type of filing	Number of hours per response
"Opt-In" Notices	1
Initial Notices	1
Joint Notices	2
Post-Arbitration Summaries	3
Appeals of Arbitrators' Decision	25

Frequency: On occasion

Estimated Average Annual Number of Responses

Type of filing	Number of responses
"Opt-In" Notices*	3
Initial Notices	21
Joint Notices	18
Post-Arbitration Summaries	21

Appeals of Arbitrators' Decision	6

*Each of the seven "Opt-In" Notices have a five-year term and have been averaged over three years and rounded up.

Total Burden Hours (annually including all respondents): 273 (sum of estimated hours per response x number of annual responses for each type of filing)

Total Annual Burden Hours

Type of filing	Hours per response	Annual number of filings	Total annual burden hours
"Opt-In" Notices*	1	3	3
Initial Notices	1	21	21
Joint Notices	2	18	36
Post-Arbitration Summaries	3	21	63
Appeals of Arbitrators' Decision	25	6	150
Total annual burden hours			273

* Each of the seven "Opt-In" Notices have a five-year term and have been averaged over three years and rounded up.

Total "Non-hour Burden" Cost: There are no non-hourly burden costs for this collection. The collections may be filed electronically.

Needs and Uses: Under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, the Board is responsible for the economic regulation of common carrier rail transportation. Under the proposed 49 CFR part 1108, subpart B, and as described in detail above, Class I (large) rail carriers subject to the Board's jurisdiction may agree to participate in the Board's arbitration program by filing a notice with the Board to "opt in" to arbitration. These "Opt-In" Notices have a five-year term, and, once a rail carrier is participating in the Board's arbitration program, it may withdraw from participation only if there is a material change in the law regarding how

the railroad rates are challenged. To initiate an actual arbitration over a rate dispute, a shipper may submit an Initial Notice of Intent to Arbitrate to the railroad stating that it wishes to invoke the arbitration process. The parties may then explore mediation. If the mediation is waived or is unsuccessful, the parties may send a Joint Notice to Arbitrate to the Board's Office of Public Assistance, Governmental Affairs, and Compliance, alerting that office that they intend to proceed to the arbitration phase of the Board's proposed small rate case arbitration program, upon which time certain waybill data may be available to them.

Upon conclusion of arbitration, the arbitrator's decision is confidential and not filed with the Board. The parties are required, however, to provide a post-arbitration summary to the Board within 14 days after the arbitrators' decision. Finally, the parties may appeal an arbitration decision, requesting that the Board vacate or modify the arbitrators' decision (at which time, a confidential version of the arbitration decision would be provided to the Board). These are the steps that provide for the collection of information under the PRA.

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